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# Reclaiming International Law from Extraterritoriality

Austen L. Parrish

**Article**

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## INTRODUCTION

Over the past decade, international law scholars have engaged in an ongoing intellectual skirmish. On one side are the Sovereigntists.[1] Animated by legal and political realism, the Sovereigntists' ranks are filled with scholars who are skeptical of—if not hostile to—international law and institutions.[2] For Sovereigntists, sometimes referred to as nationalists or revisionists,[3] international law poses a threat to democratic sove-

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1. Peter Spiro is often attributed with coining the term Sovereigntist in a well-known *Foreign Affairs* article with the same title. Peter J. Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov.–Dec. 2000, at 9 [hereinafter Spiro, *The New Sovereigntists*]; *see also* Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 653 n.16 (2002) [hereinafter Spiro, *Globalization*] (introducing the basic beliefs of Sovereigntists).

2. *See* Spiro, *The New Sovereigntists*, *supra* note 1, at 9.

3. Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1405 n.4 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005)); *see also* JOHN YOO, THE POWERS OF WAR AND PEACE 7 (2005) (describ-

reignty, and in turn to American culture and uniqueness.[4] In many contexts, the Sovereigntists contend, international law amounts "to a mere set of rhetorical statements that are obeyed only when convenient to those holding the reins of coercive power."[5] International law must be narrowly cabined and downplayed to avoid undermining American interests. From the Sovereigntist perspective, those who uncritically embrace liberal internationalism are naïve. Scholars like Curtis Bradley, Jack Goldsmith, Julian Ku, Eric Posner, Jeremy Rabkin, Jed Rubenfeld, and John Yoo are often identified with the Sovereigntist movement.[6]

ing the revisionist movement); Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319, 341–42 (2005) (arguing revisionism is a better characterization of this group of scholars); Ariel N. Lavinbuk, Note, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket*, 114 YALE L.J. 855, 864–65 (2005) (identifying key characteristics of revisionist scholarship).

4. Daniel W. Drezner, *On the Balance Between International Law and Democratic Sovereignty*, 2 CHI. J. INT'L L. 321, 323–34 (2001) (describing concern that international law is "making a sure and steady encroachment on democratic sovereignty, affecting the United States in particular"); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 873 (1997) (arguing that customary international law carries with it implications that are in tension with [America's] constitutional principles); Jed Rubenfeld, Commentary, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2006 (2004) ("[I]nternational law today rests on a fundamentally antidemocratic conception of fundamental law . . . ."). *But see* Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193, 1196 (2005) (rebutting claims for the existence of a "democratic deficit at the international level"). For a recent discussion of the perceived threat that international law poses to democratic sovereignty in the debate over the use of international (or foreign) law in constitutional decisions, see John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1179 (2007); *cf.* Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 37–38 (1995) (arguing against the use of foreign law by U.S. courts because of its perceived democratic deficiency).

5. Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485, 492–93 (2005) (citing GOLDSMITH & POSNER, *supra* note 3); *see also* Jack Goldsmith & Eric A. Posner, *The New International Law Scholarship*, 34 GA. J. INT'L & COMP. L. 463, 468 (2006) ("International law is limited because it is a product of, and is bounded by, state interests and the distribution of power.").

6. Kenneth Anderson, *Remarks by an Idealist on the Realism of* The Limits of International Law, 34 GA. J. INT'L & COMP. L. 253, 262 (2006) (describing the "'new sovereignty' positions put forward by such writers as Jeremy Rabkin, Julian Ku, Jack Goldsmith, John Yoo, Curtis Bradley, and Jed Rubenfeld, among others"); John E. Noyes, *Universalism and the American Tradition of International Law*, 21 CONN. J. INT'L L. 199, 201–02 (2006) (describing the "modern 'revisionist' scholarship of Curtis Bradley, Jack Goldsmith, John Yoo, Michael Glennon, and others" who are "dismissive of international law, mini-

On the other side are the modern Internationalists.[7] These scholars reject the Sovereigntist thesis and instead herald international law as the key means of promoting human and environmental rights, as well as global peace and stability. The modern Internationalists, however, approach these goals from a perspective different than their predecessors.[8] They are *modern* in their orientation because they view international norms as appropriately created and enforced at the substate or transnational level.[9] Buoyed by concepts of universal jurisdiction and loosened constraints on territoriality, the modern Internationalists find the traditional view of international lawmaking as the exclusive business of nation-states to be anachronistic. Rather, they embrace transnational processes, transgovernmental networks, and cheer that national governments are no longer the sole bearers of rights and duties in the international sphere.[10] Consistent with this focus on substate and nonstate actors, the modern Internationalists have sought to deploy domestic courts around the world to implement and enforce international law.[11] Yale's Dean Harold Koh and Princeton's Dean Anne-Marie Slaughter are among the most well known of these scholars, while many other well-regarded academics em-

mizing its significance or denying altogether its reality"); Spiro, *The New Sovereigntists*, *supra* note 1, at 9–10, 13 (identifying Curtis Bradley, Jack Goldsmith, Jeremy Rabkin, and John Yoo as Sovereigntist scholars).

7. *See, e.g.*, Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1569 (2006) (describing a group of international law scholars who "welcome learning from abroad").

8. *See infra* notes 54–56 and accompanying text. Scholars like Louis Henkin, Philip C. Jessup, and Oscar Schachter are often associated with the traditional Internationalist position. *See* LOUIS HENKIN, HOW NATIONS BEHAVE 1–8 (2d ed. 1979); PHILIP C. JESSUP, A MODERN LAW OF NATIONS 1–15 (1948); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 1–16 (1991).

9. *See infra* Section I.B.

10. Yishai Blank, *Localism in the New Global Legal Order*, 47 HARV. INT'L L.J. 263, 265 (2006); *see also* Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 169–76 (1999).

11. *See, e.g.*, William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT'L L.J. 129, 129–35 (2000); Leah Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2281–91 (1991); Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combating Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT'L L.J. 169, 193–201 (1987) [hereinafter Koh, *Civil Remedies for Uncivil Wrongs*]; Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2350–75 (1991) [hereinafter Koh, *Transnational Public Law Litigation*].

brace, to differing degrees, the modern Internationalist perspective.[12]

Although it has played out in the halls of academia and in the pages of prominent law journals, the clash between these two perspectives is hardly academic. Much is at stake. Understanding how these perspectives differ affects the way academics, lawyers, and policymakers think about international law, the relationship between international and domestic courts, and the value of multilateral, international treaties.[13] More palpably, the Sovereigntist-versus-Internationalist debate has paved the way for changes occurring in international law and relations. In the last two decades, the United States has disengaged from the traditional sources of international law, declining to enter into multilateral conventions or undertake new international legal obligations.[14] Concomitant with this retreat—filling the void left by U.S. disengagement—the number of U.S. lawsuits where American laws are applied extraterritorially[15] to solve global problems has grown. This trend, however, is not peculiar to the United States. Increasingly other countries are also applying their laws extraterritorially to exert international influence and solve transboundary challenges.[16] Whether spurred by globalization, the end of the Cold War, or other causes, the traditional sources of international law are neglected now more than ever.[17]

12. For some of the leading scholarship, see *infra* notes 62–82.

13. *See* OONA A. HATHAWAY & HAROLD HONGJU KOH, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS 3 (2005) (describing the importance of appreciating the different theoretical perspectives animating international law scholarship); *see also* Stephen M. Walt, *International Relations: One World, Many Theories*, FOREIGN POL'Y, Spring 1998, at 29, 29 ("We need theories to make sense of the blizzard of information that bombards us daily. Even policymakers who are contemptuous of 'theory' must rely on their own (often unstated) ideas about how the world works in order to decide what to do.").

14. *See infra* Section II.A.

15. Extraterritoriality is defined in myriad ways. Broadly, "a case involves extraterritoriality when at least one relevant event occurs in another nation." Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1218 n.3 (1992). For purposes of this Article, extraterritoriality exists when a court applies domestic laws to foreigners for conduct occurring beyond the country's borders. The extraterritorial application of law is also sometimes referred to as the exercise of "prescriptive" or "legislative" jurisdiction. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 (1987). This Article does not address the extraterritorial regulation of a country's own citizens.

16. *See infra* notes 191–206 and accompanying text.

17. *See* Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1031, 1060 (listing the traditional sources of international law,

Although academics have written extensively about other changes to the international system—the influence of international organizations, the proliferation of independent international tribunals, and the role of substate and local governments, to name a few—the rise of global extraterritoriality as an alternative to international lawmaking has received less attention.[18] Sovereigntists support the spreading disengagement with international law, satisfied if politics and power drive international policy.[19] Aside from the human rights literature, where a heated debate ensues,[20] the Sovereigntists appear not especially alarmed over the growth of extraterritoriality, believing it to be largely an American phenomenon. The modern Internationalists also seem undisturbed. Without considering important distinctions between extraterritorial domestic laws and the integration of international law,[21] Internationalists are encouraged if progress occurs on the domestic front where inter-

including international conventions).

18. A vast literature concerns the effects of international law on domestic governance, and a burgeoning amount of scholarship addresses the integration of international law into domestic regimes. Markedly less attention, however—particularly outside the conflicts of law literature—has been given to the interaction of domestic extraterritorial law and international law. For some exceptions, see Tonya L. Putnam, Courts Without Borders: The Domestic Sources of U.S. Extraterritorial Regulation (forthcoming) (manuscript on file with author); Christopher A. Whytock, Domestic Courts and Global Governance (forthcoming) (manuscript on file with author).

19. For a recent example, see Eric A. Posner & John Yoo, *International Law and the Rise of China*, 7 CHI. J. INT'L L. 1, 15 (2006) (rejecting the view that the United States should support international institutions in containing Chinese hegemony and advocating for the United States to "strengthen[] its military, economic, and political relationships").

20. Sovereigntists have criticized human rights litigation in U.S. courts. *See, e.g.*, Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 458 (2001); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 320 (1997); *see also* David J. Bederman, *International Law Advocacy and Its Discontents*, 2 CHI. J. INT'L L. 475, 476 (2001) (discussing scholarship which considers various implications of international human rights litigation in the United States); *cf.* Curtis A. Bradley et al., Sosa*, Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 870 (2007) (arguing that customary international law is not self-executing as federal common law and discussing the use of customary international law in Alien Tort Statute litigation).

21. For recent articles discussing the integration of international law into domestic regimes, see Margaret E. McGuinness, Sanchez-Llamas*, American Human Rights Exceptionalism and the VCCR Norm Portal*, 11 LEWIS & CLARK L. REV. 47, 48, 51–52 (2007); Resnik, *supra* note 7, at 1567–70; Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 652–94 (2007).

national norms can be internalized.[22] In general, academics have accepted the growth of extraterritoriality as an inevitable—and either a desirable or innocuous—byproduct of globalization.

The acceptance is unfortunate: this Article argues that both the Sovereigntists and the modern Internationalists underestimate the problems that extraterritoriality engenders. The conventional wisdom from both groups, given the global rise of extraterritoriality, is unlikely to advance the goals that each seeks. On the one hand, in a modern integrated, globalized world, those concerned with safeguarding democratic sovereignty should turn toward, not away from, international law. The rise of extraterritorial domestic law (law unilaterally applied to the conduct of foreigners abroad) poses a greater threat to democratic sovereignty than traditional sources of international law. Also, the use of international treaties combined with robust international institutions may be one of the best ways to reclaim sovereign integrity. On the other hand, the extraterritorial application of domestic laws in transnational litigation threatens concepts of human dignity, human rights, and environmental rights in the long term more than the modern Internationalists realize. Contrary to prevailing wisdom, the disassembling of the nation-state and the declining salience of territorial borders—to the extent it manifests itself in extraterritorial domestic actions—is a troubling, not a positive, development. Broadly speaking, human rights and environmental rights are better protected when international problems are solved internationally, not unilaterally (or even surreptitiously) through domestic litigation.

This Article offers a way beyond the stalemate that the Sovereigntist and modern Internationalist perspectives have produced. In so doing, it advocates an approach different from the dominant views prevailing in international law scholarship; an approach that acknowledges changes in the international system, but also seeks to shore up territorial sovereignty to prevent the problems that extraterritoriality creates. Multilateral treaty-making processes should be reinvigorated and traditional international lawmaking embraced, while domestic litigation

22. *See, e.g.*, Harold Hongju Koh, The 1998 Frankel Lecture: Bringing International Law Home (Apr. 8, 1998), *in* 35 HOUS. L. REV. 623, 626–27 (1998) (describing how "vertical domestication" occurs through transnational law, "whereby international law norms 'trickle down' and become incorporated into domestic legal systems").

should be used more cautiously in response to international challenges.[23] In short, recent international law scholarship has too often celebrated the demise of territoriality without appreciating the risks that extraterritorial approaches to international challenges pose. In staking this position, the Article avoids concluding whether the Sovereigntists' or the modern Internationalists' view of the world is normatively preferred. Rather it seeks to reveal problems with extraterritoriality for both schools of thought. The Article also does not challenge the empirical observation that local actors are playing a more prominent role in international relations, or that in many ways this is a good thing. Nevertheless, downplaying the role that states and traditional international law should play in addressing international challenges is a mistake.

The Article proceeds in three parts. In Part I, the Article explores the two dominant, broadly defined perspectives in current international law scholarship—Sovereigntism and modern Internationalism. In Part II, the Article describes how the positions staked by scholars with these differing perspectives have encouraged changes in the international legal system: the U.S. disengagement with multilateral treaties, and the replacement of international with domestic law. Lastly, in Part III, the Article describes why extraterritoriality is a development to be concerned with, not applauded. Taking the concerns of both the Sovereigntists and the modern Internationalists seriously, extraterritoriality poses a greater threat to what both groups value most than does traditional international law. The Article closes by exploring the implications of this critique, and by promoting a cautious return to a more traditional approach to international lawmaking.

## I. SETTING THE INTELLECTUAL CONTEXT

No single label applies for the different theories at play in international law scholarship; although many schools of thought, ranging from realism, to liberalism, to institutionalism, to constructivism, among others, exist.[24] Yet in very broad

23. *Cf.* Alfred P. Rubin, *Can the United States Police the World?*, 13 FLETCHER F. WORLD AFF. 371, 374 (1989) ("Our actions would be more effective if aimed at achieving international cooperation in ways consistent with the international legal order instead of simply asserting wider American prescriptive, adjudicatory, and enforcement jurisdiction.").

24. *See* Walt, *supra* note 13, at 30–42 (providing an overview of realism, institutionalism, and constructivism); *see also* Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE

terms, much recent international law scholarship can be characterized as falling into one of two categories: that which is skeptical of international law (i.e., Sovereigntist scholarship) and that which more readily embraces and encourages international law and institutions (i.e., Internationalist scholarship).[25]

### A. THE SOVEREIGNTISTS

Drawing from realist origins,[26] Sovereigntists emphasize the role of power and state interests in international law and relations.[27] Grounded in a "general skepticism of international

J. INT'L L. 335, 336–41 (1989) (introducing major theoretical paradigms in international relations theory); Peter J. Kaztenstein et al., International Organization *and the Study of World Politics*, 52 INT'L ORG. 645, 646–50 (1998) (describing realism, neoliberal institutionalism, liberalism, and constructivism); Susan Peterson et al., *Inside the Ivory Tower*, FOREIGN POL'Y, Nov.–Dec. 2005, at 58, 61 (discussing trends in international relations theory). For a thorough description of these schools of thought in the context of debates over international organizations, see JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 17–45 (2005).

25. Categorizing international scholars as either Sovereigntists or Internationalists is well accepted. *See, e.g.*, David J. Bederman, *Globalization, International Law and United States Foreign Policy*, 50 EMORY L.J. 717, 721, 732–35 (2001) (reflecting on differences between Sovereigntists and Internationalists); Margaret E. McGuinness, *Contesting the "Sovereigntists": How to Learn to Stop Worrying and Love International Institutions*, 38 GEO. WASH. INT'L L. REV. 831, 831 (2006) (reviewing DAN SAROOSHI, INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS (2005)) (describing Sovereigntist and Internationalist positions); Resnik, *supra* note 7, at 1569 ("The Sovereigntist model has a competitor: internationalism."); David Sloss, *Using International Law to Enhance Democracy*, 47 VA. J. INT'L L. 1, 48–49 (2006) (explaining Sovereigntist and Internationalist positions regarding the International Covenant on Civil and Political Rights). Other terms are also used to describe these two broadly defined divisions in international law scholarship. *See, e.g.*, John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205, 206 (2000) ("In substantive field after field—human rights, labor, health, the environment, political-military affairs, and international organizations—the Globalists have been advancing while the Americanists have slept."); Jonathan D. Greenberg, *Does Power Trump Law?*, 55 STAN. L. REV. 1789, 1791 (2003) (describing the difference between realists and liberal internationalists); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 476–77 (2005) (detailing the difference between interest-based and norm-based approaches to international law).

26. Greenberg, *supra* note 25, at 1804–05 (describing realism in international relations theory); Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 64, 71–76 (2006) (describing different approaches to realism and asserting that Sovereigntists draw from concepts of structural realism). For the classic realist account, see HANS MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 4–17 (6th ed. 1985).

27. For some examples of this theory, see GOLDSMITH & POSNER, *supra*

law and institutions,"[28] and a concern that America is "outsourcing" its sovereignty to international institutions,[29] Sovereigntists generally embrace the realist conclusion that "international law essentially does not matter (or does not matter very much)."[30] At times, American exceptionalism[31]—the idea that the United States is different from the rest of the world, and unbound by the rules it promotes[32]—is the basis for the conclusion. At other times, the conclusion is animated by a concern that other countries use international law selectively and strategically to advance their interests on the global stage, at American expense.[33] In some ways, the Sovereigntist position has developed as a backlash against neoliberal globalization and in favor of national control. As a result, scholars sometimes describe the Sovereigntist movement as nationalist or revisionist.[34]

Sovereigntists, although cynical of many forms of international law, particularly distrust multilateral treaties and the supranational institutions they create.[35] Treaties are viewed as subservient to state power and therefore weak and unreliable.[36]

note 3, at 3 (describing a modern rational choice theory of international law); KENNETH WALTZ, THEORY OF INTERNATIONAL POLITICS (1979) (describing the classic account of neorealism or structural realism).

28. Spiro, *Globalization*, *supra* note 1, at 654 n.16; *see also* U.S. DEP'T OF DEF., THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 5 (2005) ("Our strength as a nation will continue to be challenged by those who employ a strategy of the weak, focusing on *international fora*, judicial processes, and terrorism." (emphasis added)).

29. McGuinness, *supra* note 25, at 831; *see, e.g.*, Robert Bork, *The Limits of International "Law,"* NAT'L INT., Winter 1989–1990, at 1, 1–10 (criticizing international law and arguing that reliance on it is often against U.S. interests); Charles Krauthammer, *The Curse of Legalism*, NEW REPUBLIC, Nov. 6, 1989, at 44 (arguing against the use of international law).

30. Greenberg, *supra* note 25, at 1791.

31. For a description of different kinds of American exceptionalism, see Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1480–87 (2003); *see also* McGuinness, *supra* note 21, at 48, 51–52 (describing American exceptionalism in the human rights context).

32. *See* James C. Hathaway, *America, Defender of Democratic Legitimacy*, 11 EUR. J. INT'L L. 121, 121 (2000).

33. For a brief discussion of strategic American and European uses of international law, see Drezner, *supra* note 4, at 329–32.

34. *See* sources cited *supra* note 3.

35. Opposition to the Rome Statute and the International Criminal Court is commonly cited as an example of this cynicism. *See* Mariano-Florentino Cuéllar, *The International Criminal Court and the Political Economy of Anti-treaty Discourse*, 55 STAN. L. REV. 1597, 1601–06 (2003).

36. Greenberg, *supra* note 25, at 1796 (citing EDWARD HALLETT CARR, THE TWENTY YEARS' CRISIS 1919–1939: AN INTRODUCTION TO THE STUDY OF

Sovereigntists also condemn treaties for reaching "deeply into the internal affairs of sovereign nations," threatening "internal systems of government."[37] At minimum, international commitments have a "tendency . . . to shift powers and responsibilities from national and sub-national units, with active, reachable legislative bodies to remote international bureaucracies."[38] Sovereigntists believe that treaties should have very limited domestic effect.[39] Additionally, Sovereigntists often criticize classic liberal Internationalists, who value international treaties and global governance, as naïvely idealist.[40]

At the heart of the Sovereigntists' perspective lies the question of democratic legitimacy.[41] Sovereigntists worry that "international law takes policymaking power out of the hands of those [the Sovereigntists] think should have it (the political branches and state governments, chief among them) and gives it to those who should not (international institutions and unelected federal judges) . . . ."[42] As a result, the "extreme end of

INTERNATIONAL RELATIONS 181–87 (2d ed. 1946)); *see also* GOLDSMITH & POSNER, *supra* note 3, at 87 (noting skepticism that "genuine multinational collective action problems can be solved by treaty").

37. *American Land Sovereignty Protection Act: Hearing on H.R. 883 Before the H. Comm. On Resources*, 106th Cong. 102 (1999) (statement of Jeremy Rabkin); *cf.* John R. Bolton, *Is There Really "Law" in International Affairs?*, 10 TRANSNAT'L L. & CONTEMP. PROBS. 1, 26–27 (2000) (arguing that treaties are not legally binding).

38. Detlev F. Vagts, *International Agreements, the Senate and the Constitution*, 36 COLUM. J. TRANSNAT'L L. 143, 154 (1997).

39. *See* Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self Execution*, 55 STAN. L. REV. 1557, 1595–96 (2003) (supporting the non-self-execution of treaties as a matter of constitutional concern); Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 456–68 (2000) (maintaining that the Senate may impose unilateral conditions limiting or nullifying treaty obligations); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2091 (1999) (arguing almost all treaties are non-self-executing); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Executio*n, 99 COLUM. L. REV. 2218, 2219 (1999) (contending the text and structure of the Constitution support a presumption that treaties are not self-executing).

40. *See* Kenneth Anderson, *The Ottawa Convention, Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT'L L. 91, 97 (2000) (criticizing "the myopia of wishful and self-righteous internationalist thinking"); Stephen D. Krasner, *Realist Views of International Law*, 96 AM. SOC'Y INT'L L. PROC. 265, 268 (2002) ("It is naïve to expect that a stable international order can be erected on normative principles embodied in international law.").

41. *See* sources cited *supra* note 4.

42. Hathaway & Lavinbuk, *supra* note 3, at 1406–07; *see also* Paul B.

the sovereigntist side of the debate has been marked by nativist fears of erosion of American social and political fabric, and, notably, by the belief that participation in international institutions and judicial processes actually weakens national security."[43]

At the very least, scholars skeptical of international law and its institutions often refer to the threat it poses to sovereignty, its lack of accountability, and to the notion of a "mounting 'democratic deficit' in global governance."[44] Plenty of scholarship questions whether international law and institutions are consistent with the U.S. constitution and principles of democratic sovereignty.[45]

Stephan, *International Governance and American Democracy*, 1 CHI. J. INT'L L. 237, 238 (2000) (arguing that international law is steadily encroaching upon democratic sovereignty).

43. McGuinness, *supra* note 25, at 832; *cf.* JEREMY A. RABKIN, LAW WITHOUT NATIONS? 45–70 (2005) (explaining the importance of American sovereignty); Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 WASH. U. GLOBAL STUD. L. REV. 345, 346 (2005) ("[Transnationalism] is part of an elite-driven, politically motivated worldwide trend toward judicial governance, which is antithetical to democratic self-rule, if not to the rule of law itself.").

44. Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT'L ECON. L. 841, 844 (2003); *see* Resnik, *supra* note 7, at 1574 ("American sovereigntists insist on a competing ethical obligation—to majoritarian decisionmaking."); *see also* sources cited *supra* note 4. For particularly bleak outlooks on the threat international law poses to democracy, see Bob Barr, *Protecting National Sovereignty in an Era of International Meddling: An Increasingly Difficult Task*, 39 HARV. J. ON LEGIS. 299 (2002) (arguing that international law and particularly international organizations are a threat to U.S. democratic sovereignty); Jed Rubenfeld, *The Two World Orders*, WILSON Q., Autumn 2003, at 22, 34 ("International law is a threat to democracy and to the hopes of democratic politics all over the world.").

45. *See, e.g.*, Bradley, *supra* note 39, at 1560 (analyzing whether treaty delegations to international bodies are constitutional); Michael J. Glennon & Allison R. Hayward, *Collective Security and the Constitution: Can the Commander in Chief Power Be Delegated to the United Nations?*, 82 GEO. L.J. 1573, 1587 (1994) (analyzing whether the President may constitutionally place U.S. troops under UN command); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 76 (2000) (exploring whether treaty-based international delegations are constitutional); John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1713 (2000) (discussing constitutional limitations on the President's authority to place U.S. troops under foreign command); John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87, 116 (1998) (exploring the constitutionality of the Chemical Weapons Convention, given its creation of an international organization with authority to search U.S. territory).

Notably, Sovereigntists traditionally focus almost exclusively on state-level interactions, and deemphasize substate dynamics.[46] To some extent, this is natural. The theories that commonly animate the Sovereigntist perspective (realism and rationalism) usually view states as rational actors in pursuit of self-interest.[47] To the extent that Sovereigntists have focused on the extraterritorial application of domestic law then, they have mostly limited their critiques to public international law litigation.[48] And in that context, the general approach is to criticize extraterritorial human rights litigation, without providing an alternative remedy for victims of abuse. Sovereigntists do not encourage the strengthening of international human rights regimes. Nor do they urge that the United States sign on to additional human rights treaties.

Often Sovereigntists are perceived as allied with the political right. But that oversimplifies. The Sovereigntist perspective has broader appeal: "Many consumer advocates, environmentalists, and antiglobalization activists decry the 'faceless bureaucrats'" of some international organizations, "whom they see as undermining American democracy, sovereignty, and regulatory autonomy."[49] Even liberals have advocated for ignoring multilateral institutions and international law if the goals are important enough.[50] Indeed, "reservations regarding interna-

46. Hathaway, *supra* note 25, at 479.

47. *Id.* at 478.

48. *See supra* note 20.

49. Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1494 (2006) (citing LORI WALLACH & MICHELLE SFORZA, WHOSE TRADE ORGANIZATION? CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY (1999)); *see also* DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 35 (1994) (describing environmentalists' hostility to the World Trade Organization); José E. Alvarez, *Multilateralism and Its Discontents*, 11 EUR. J. INT'L L. 393, 396–97 (2000) (noting that "multilateralism's critics are not merely hard-headed political realists" but include both ends of the political spectrum and a wide number of scholars emerging with the international academy including critical legal scholars, feminists, constructivists, liberal theorists, public choice theorists and those within law and economics).

50. *See, e.g.*, W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3, 17 (2000) (supporting unilateralism in the context of humanitarian intervention, even when the action is contrary to the UN Charter or more traditional sources of international law). Often opposition is to free trade agreements like NAFTA. The demonstrations in Seattle in the mid-1990s against the WTO provide another example.

tional law are now shared across the political spectrum and are embraced by conservative and liberal commentators alike."[51]

### B. THE MODERN INTERNATIONALISTS

The modern Internationalists have a different perspective from both the Sovereigntists and their liberal international law predecessors. Historically, international law was state-centric, positivistic, and focused on territorial boundaries.[52] Accordingly, international law scholars "traditionally located international law in the acts of official governmental bureaucratic entities, such as the treaties and agreements entered into by nation-states, the declarations and protocols of the United Nations (UN) or other affiliated bodies, and the rulings of international courts and tribunals."[53] Classic liberal internationalists argued that multilateral treaties were the primary source of law that would constrain and influence state behavior and transform the international system.[54] They sought to use multilateral treaties and international institutions as a way to promote human and environmental rights, and to secure global peace and stability. "Although some liberals flirted with the idea that new transnational actors . . . were gradually encroaching on the power of states, liberalism generally saw states as the central players in international affairs."[55] From the 1960s through the end of the Cold War, this focus on state

51. Jutta Brunnée, *The United States and International Environmental Law: Living with an Elephant*, 15 EUR. J. INT'L L. 617, 642 (2004).

52. For a general description of the territorial state and classic international law, see Austen L. Parrish, *Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Rights*, 31 AM. INDIAN L. REV. 291, 293–97 (2007). *See also* Stuart Elden, *Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders*, 26 SAIS REV. 11, 11 (2006) ("Since the end of World War II, the international political system has been structured around three central tenets: the notion of equal sovereignty of states, internal competence for domestic jurisdiction, and territorial preservation of existing boundaries."); Michael M'Gonigle, *Between Globalism and Territoriality: The Emergence of an International Constitution and the Challenge of Ecological Legitimacy*, 15 CANADIAN J.L. & JURISPRUDENCE 159, 168 (2002) (referring to "[t]he political legitimacy and exclusivity accorded to the organized sovereign state as the sole subject of international law").

53. Berman, *supra* note 5, at 492.

54. Greenberg, *supra* note 25, at 1791. For examples of the classic liberal internationalist view of international law, see THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995), and HENKIN, *supra* note 8.

55. Walt, *supra* note 13, at 32.

action—and the treaties signed and ratified by nation-states—dominated international law scholarship.[56]

In recent years, however, the salience of the sovereign state as the only subject of international law has declined.[57] Contrary to the classic positivist view of international law, "[s]tates are no longer the sole bearers of rights and duties in the international sphere, nor are they the sole actors in the international arena."[58] Nonstate actors are important.[59] Indeed, domestic interest groups, nongovernmental organizations, multinational corporations, and many other groups play an important role in the globalized world.[60] Or, put differently, "[a]s sovereignty has declined in importance, global decision-making functions are now executed by a complex rugby scrum of nation-states, intergovernmental organizations, regional compacts, nongovernmental organizations, and informal regimes and networks."[61]

56. *See* David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335, 341–42 (2000) (describing a post-1960 resurgence of "updated, pragmatic, and liberal internationalism" lasting to the end of the Cold War); *see also* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2630 (1997) (describing changes occurring after the end of the Cold War).

57. For well-known discussions of the changing role of state sovereignty, see ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995); STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999); SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION (1996).

58. Yishai Blank, *Localism in the New Global Legal Order*, 47 HARV. INT'L L.J. 263, 265 (2006); *see also* Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 169 (1999) (arguing that states are not "monolithic entities" and that competing domestic interest groups play a crucial role).

59. *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 5–6 (2004); *see also* Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. INT'L L. & POL. 527, 529–30 (2001) (describing the classic system where the "state was the only player, and the need to protect its sovereignty was paramount," and discussing the recent changes to this model, including the rise of nonstate actors); Peter J. Spiro, *Nonstate Actors in Global Politics*, 92 AM. J. INT'L L. 808 (1998) (reviewing literature describing the rise of nonstate actors in international law); Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.–Oct. 1997, at 183, 184–86 (explaining that the state is disaggregating and noting the gain in power of nonstate actors).

60. Blank, *supra* note 58, at 265; *see also* José E. Alvarez, *The New Treaty Makers,* 25 B.C. INT'L & COMP. L. REV. 213, 218–32 (2002) (discussing the role of international organizations); Phillip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1946 (1997) (describing the increased role of private personae, multinational corporations, and international institutions).

61. Koh, *supra* note 56, at 2631.

Dramatic as these changes have been, equally dramatic have been the changes in international law scholarship. In the past decade, a new surge of international law scholarship attempted to inject a different approach to understanding how and why states comply with international law.[62] Drawing from constructivist schools of international relations scholarship,[63] it became a common strand in this new scholarship that the nation-state is no longer—and should not be—the only relevant actor in creating international law.[64] This scholarship was new in its approach because although still internationally focused, it urged nonstate actors to create and enforce, more than ever before, international norms at the substate level.[65] In part, NGOs closely allied themselves with and promoted this scholarship as they sought to secure their positions and authority as key players in the emerging field of international human rights.[66] The modern Internationalists thus challenged the traditional statist foundations of liberal internationalism, which their predeces-

62. Julian G. Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1, 37 (2006) (discussing "a new wave of international law scholarship" focused on "disaggregating the state into its constituent elements"); *see generally* JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 25–33, 201–02, 959–61 (2d ed. 2006) (describing changes in international law theory).

63. Ku, *supra* note 62, at 37; *see also* Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda,* 87 AM. J. INT'L L. 205, 226–38 (1993) (discussing influences of constructivism on liberal internationalism).

64. *See, e.g.*, Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 BROOK. J. INT'L L. 17, 22–25 (1999) (discussing the important role of multinational corporations in protecting human rights); Oscar Schachter, *The Decline of the Nation-State and its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7, 21–22 (1997).

65. Liberal internationalists have long separated the individual from the state, and believe that nonstate actors compete with nation-states in the international arena. *See* J. MARTIN ROCHESTER, BETWEEN PERIL AND PROMISE: THE POLITICS OF INTERNATIONAL LAW 21–23 (2006). But traditional scholarship has squarely located advances in the international legal system in the promulgation of treaties and international institutions. *See supra* notes 52–56 and accompanying text.

66. *See* YVES DEZALAY & BRYANT GARTH, THE INTERNATIONALIZATION OF PALACE WARS 10, 181–84 (2002) (describing the influence of NGOs); Yves Dezalay & Bryant Garth, *From the Cold War to Kosovo: The Rise and Renewal of the Field of International Human Rights*, 2 ANN. REV. L. & SOC. SCI. 231, 231–32 (2006) (describing the influence of three major human rights nongovernmental organizations in the period after World War II); *see also* DUNOFF ET AL., *supra* note 62, at 201–16 (describing the increased influence of NGOs on international lawmaking).

sors embraced.[67] Often referred to as disaggregationist or transnationalist, scholars like Harold Koh[68] and Anne-Marie Slaughter[69]—although taking different theoretical perspectives—were at the forefront of this new internationalist movement.

A related phenomenon, however, also occurred. As realist, state-centric visions of international law came to be seen as overly simplistic, the modern Internationalists also sought to overcome that aspect of the classic model that treated international litigation as separate from domestic litigation.[70] Just as nontraditional actors were assuming important roles in international law, so too—thought the modern Internationalists—should private plaintiffs and domestic courts.[71] The modern Internationalists accordingly not only support judges in different countries interacting and exchanging views on the meaning of law[72]—itself controversial[73]—but also encourage domestic

67. *See* Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 2–3 (2002) (describing challenges to the traditional liberal internationalist view).

68. *See* Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999); Koh, *supra* note 22, at 623.

69. In international law scholarship, Anne-Marie Slaughter may be the most prominent advocate of the liberal institutionalist perspective. *See* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995); Anne-Marie Slaughter, *The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 377 (1994); Slaughter Burley, *supra* note 63, at 205.

70. Anne-Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic (or, The European Way of Law)*, 47 HARV. INT'L. L.J. 327, 327–29 (2006) (describing the classic system of international law).

71. *See* Waters, *supra* note 21, at 652–94 (describing methods by which domestic courts incorporate international human rights laws); *see also The Challenge of Bangalore: Making Human Rights a Practical Reality*, *in* 8 DEVELOPING HUMAN RIGHTS JURISPRUDENCE 267, 268 (Commonwealth Secretariat ed., 2001) (describing how human rights transcend national political systems and how domestic courts must protect those rights).

72. *See* Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 217 (2003) ("Judges from different legal systems should expressly acknowledge the possibility of learning from one another based on relative experience with a particular set of issues and on the quality of reasoning in specific decisions."); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1124 (2000) (stating that judges should "see one another not only as servants or even representatives of a particular government or polity, but as fellow professionals in a profession that transcends national borders").

73. For a summary of the debates on whether the U.S. Supreme Court should look to foreign law, see Austen L. Parrish, *Storm in a Teacup: The U.S.*

courts to apply international and domestic laws to remedy international harms.[74] Scholars and activists began to view domestic litigation as an important step in a move toward the effective enforcement of international norms.[75]

The appeal of using domestic courts and domestic laws to solve transboundary challenges is understandable. International law based on a state-centric view of international relations has always had an uneasy relationship with the modern Internationalists' ideals. Only recently has a state's treatment of its own citizens become a matter of international rather than merely domestic concern.[76] For instance, it was not until after the Second World War[77] that human rights law developed into a meaningful, independent constraint on state action and a means to temper unlimited state power.[78] More importantly,

*Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637, 649–52.

74. For some well-known examples, see Brilmayer, *supra* note 11, at 2277 (describing various uses of international law in American courts, including in the context of extraterritorial jurisdiction); Koh, *Transnational Public Law Litigation*, *supra* note 11, at 2347 (advocating and encouraging transnational public law litigation).

75. *See* Koh, *supra* note 56, at 2602 (arguing for a transnational legal process); Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFF., Sept.–Oct. 2000, at 102, 115 (embracing a "transnational legal system capable of enforcing international law," while criticizing "unilateral legal expansion"). Dean Koh has written extensively on the subject of transnational public law litigation. *See* Koh, *Civil Remedies for Uncivil Wrongs*, *supra* note 11, at 169; Koh, *Transnational Public Law Litigation*, *supra* note 11, at 2347. Dean Koh's work builds, in part, on the public law litigation work by Abram Chayes in the 1970s. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

76. Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 STAN. ENVTL. L.J. 71, 83 (2005) (discussing international human rights law); *see also* Winston P. Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43 COLUM. J. TRANSNAT'L L. 141, 177 (2004) (stating that if sovereigns "abuse their rights and disparage their obligations, they could be accused of being delinquent in international law").

77. *See* Louis Henkin, *Human Rights and State "Sovereignty,"* 25 GA. J. INT'L & COMP. L. 31, 33–34 (1995) (noting the shift at midcentury from state values to human values in international law); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 217–20 (2000) (considering the reasons for the construction of human rights regimes after the Second World War).

78. *See* Slaughter & Burke-White, *supra* note 70, at 327 (noting how "growing bodies of human rights law and international criminal law" have "penetrated the once exclusive zone of domestic affairs"); *see also* Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1, 21 (2002) ("[C]ivilian inviolability has been transformed from a rhetorical aside to a basic principle in many areas of international

international law has lacked effective enforcement mechanisms.[79] No international tribunal exists exclusively to adjudicate and resolve complaints when international law violations occur.[80] And even if an international tribunal could adjudicate a particular dispute, it would lack coercive mechanisms to compel even appearance, let alone compliance.[81] Human rights and environmental rights advocates also felt at home in domestic courts, and through these actions sought to expand their influence.[82] In this context, the scholarly turn to the domestic seems almost inevitable.

## II. EMERGING TRENDS: REPLACING INTERNATIONAL LAW WITH DOMESTIC (TRANSNATIONAL) LAW

The intellectual debate sketched above has had an impact.[83] It has created a fertile environment where traditional

law.").

79. Hathaway, *supra* note 25, at 489–91 (describing how international law often lacks enforcement and contrasting enforcement in domestic lawsuits).

80. Bradley, *supra* note 20, at 458. Both the International Court of Justice (ICJ) and the International Criminal Court (ICC) are, of course, international courts, but they possess limited jurisdiction, and relatively few international issues are resolved in either forum. *See* Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1055, 1060 (providing that the ICJ hears disputes only between states who have accepted the court's jurisdiction); Rome Statute of the International Criminal Court arts. 12–13, July 17, 1998, 2187 U.N.T.S. 90, 99 (authorizing the ICC to exercise jurisdiction over nationals of a nonstate party if (1) a national of an accepting nonstate party commits a crime within the territory of a state party, or (2) a national of a nonstate party commits a crime referred to the ICC by the Security Council).

81. Helfer & Slaughter*, supra* note 69, at 285.

82. *See* Peer Zumbansen, *Beyond Territoriality: The Case of Transnational Human Rights Litigation* (CONWEB Paper No.4/2005), http://www.bath.ac.uk/esml/conWEB/Conweb%20papers-filestore/conweb4-2005.pdf (outlining the use of civil litigation to redress alleged human rights abuse by public and private actors); *see also* Anne-Marie Slaughter & David L. Bosco, *Alternative Justice*, CRIMES OF WAR PROJECT, May 2001, http://crimesofwar.org/tribunmag/mag_relate_alternative.html (noting the trend for victims of human rights abuses to seek relief in courts).

83. For recent articles that describe how conceptions of international law have influenced policy on the ground, see David J. Bederman, *Appraising a Century of Scholarship in the* American Journal of International Law, 100 AM. J. INT'L L. 20, 57–62 (2006) (discussing the impact of the *American Journal of International Law* on the field of international law in the last century); Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT'L L. 88 (2006) (analyzing the current debate over the role of international law in domestic affairs and the resulting policy impacts); Steinberg & Zasloff, *supra* note 26, at 86 (reviewing academic theories of international law and concluding that "each of the main orientations . . . now has a substantial—or dominant—camp

sources of international law—those created by nation-states—are seen as problematic or, at least, unfashionable. The United States has shifted its international lawmaking efforts elsewhere, and American plaintiffs perceive domestic litigation as one of the more promising means of resolving international disputes and promoting human rights.[84] Legal consciousness has changed over time so that nonstate actors, policymakers, and attorneys turn first and instinctively to extraterritorial domestic remedies, rather than international ones, when faced with an international challenge.

### A. THE DISENGAGEMENT FROM INTERNATIONAL TREATY LAW

In the years immediately following World War II, international law flourished. For its part, the United States was a leader in promoting the development of international institutions as a way of peacefully resolving disputes between nations.[85] It was the driving force behind the creation of the United Nations,[86] and Americans were "among the primary architects of the initial human rights conventions and the strongest champions of international institutions to monitor rights violations and to govern the use of military force."[87] In

that uses a combination of heuristics to understand international law"). In the international law context, international law scholarship is specifically turned to as a source of law. Statute of the International Court of Justice art. 38(1)(d), June 26, 1945, 59 Stat. 1055, 1060 (establishing a role for "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law"); Paquete Habana, 175 U.S. 677, 700–08 (1900) (noting the role of scholarly writings in determining customary international law).

84. Few articles broadly discuss these changes. For a particularly strong analysis, see Nico Krisch, *More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 135 (Michael Byers & Georg Nolte eds., 2003) (describing the U.S. shift from international law to domestic law as a tool of foreign policy).

85. William H. Taft, IV, Address, *A View from the Top: American Perspectives on International Law After the Cold War*, 31 YALE J. INT'L L. 503, 503 (2006); *see also* PETER MAGUIRE, LAW AND WAR: AN AMERICAN STORY (2000) (arguing that the Nuremberg trials exemplified U.S. efforts to replace retributive violence with international law); STANLEY MEISLER, UNITED NATIONS: THE FIRST FIFTY YEARS (1995) (describing the successes and failures of the United Nations, and how the institution grew from its founding after World War II).

86. *See generally* RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: ROLE OF THE UNITED STATES 1940–1945 (1958) (describing the U.S. role in developing the UN Charter).

87. Rubenfeld, *supra* note 4, at 1981–82; *see also* JACOB ROBINSON, HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN THE CHARTER OF THE UNITED

fact, the United States exerted its influence on an unprecedented scale.[88] The immediate postwar era was thus filled with institution-building.[89] And more than any other country, the United States was responsible for developing and promoting the international legal system.[90]

In the 1950s, U.S. enthusiasm for international law temporarily receded as nationalist tendencies took over and international law fell into disrepute. The 1950s were marked as a period of isolationism, often associated with the Bricker Amendment.[91] But by the late 1960s, and continuing into the 1990s, the United States was an active supporter and promoter of international law.[92] In many ways, international law (and, in particular, international human rights law) was instrumental as a tool the United States and other liberal democracies used to combat and contain communism.[93]

NATIONS 48 (1946) (describing how the United States pressed for the creation of the Commission on Human Rights); Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 415 (1979) (noting America's role in the development of international human rights).

88. Taft, *supra* note 85, at 503; *see also* HENKIN, *supra* note 8, at 47 (noting the relevance of international law and explaining that in the 1970s "[t]he number of agreements registered at the United Nations [exceeded] ten thousand"; in addition, "thousands of agreements [were] in effect which [were] not registered at the United Nations").

89. Kal Raustiala, *Refining* The Limits of International Law, 34 GA. J. INT'L & COMP. L. 423, 426 (2006) (book review).

90. Rubenfeld, *supra* note 4, at 1982 (citing Douglas J. Sylvester, Comment, *Customary International Law, Forcible Abductions, and America's Return to the "Savage State*,*"* 42 BUFF. L. REV. 555, 612 (1994)) ("[T]he United States has played a tremendous role in developing the current system of international law . . . .").

91. In the 1950s, the Bricker Amendment sought to make all treaties subject to legislative implementation. Arthur E. Sutherland, Comment, *The Bricker Amendment, Executive Agreements, and Imported Potatoes*, 67 HARV. L. REV. 281, 282–85 (1953); *see also* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 343 n.11 (1995).

92. Brunnée, *supra* note 51, at 620–22 (describing U.S. commitment to multilateral environmental treaties in the 1970s and 1980s); Kennedy, *supra* note 56, at 341–42 ("[A]fter about 1960, the [international law] field entered a third period of self-confident renewal, consolidating an updated, pragmatic, and liberal internationalism."); Taft, *supra* note 85, at 503–04 (describing the U.S. influence on international law after World War II and before the Cold War).

93. Dezalay & Garth, *supra* note 66, at 234–35 (describing how human rights developed as "inseparable from the Cold War strategy linked to the so-called foreign policy establishment"). Secretary of State Dean Rusk, for example, used international law during the Cold War to prevent a crisis over the control of Berlin between the Soviet Union, East Germany, and the West. In

In recent decades, however, the United States has retreated from international law and its institutions.[94] Scholars have described the American disengagement from multilateral treaties and its international legal obligations as "dazzlingly broad."[95] And as one UN organization explains: although "the United States was one of the driving forces behind establishing the United Nations in 1945 and initiated many of the multilateral treaties that have encouraged cooperation on our planet, there has been a steady decline in the U.S. government's support of the UN and the agreements it helped establish."[96] In the last decade, the United States has opposed a number of widely accepted multilateral treaties, failed to comply with international law in its War on Terrorism, and has withdrawn from several other significant treaties. In other contexts, the United States is accused of unilaterally rewriting (or at least reinter-

talks with Soviet Foreign Minister Andrei Gromyko and Soviet Ambassador Anatoly Dobrynin, Dean Rusk "asserted in formal terms the Allied rights in Berlin and the Soviet's inability under international law to bargain those rights away in any treaty with East Germany." Thomas J. Schoenbaum, *Dean Rusk and International Law*, 90 ASIL PROC. 224, 156 (1996). Khrushchev ultimately removed the deadline for evacuating Berlin, and Rusk continued the talks in Moscow. "Rusk's strategy of 'exploratory talks' on the legal status of Berlin successfully defused the crisis." *Id.* at 156.

94. *See* Esty, *supra* note 49, at 1493 & n.3, 1494 (describing how both the political left and right distrust international institutions and law, and noting the U.S. withdrawal from the Protocol to the Vienna Convention on Consular Relations, its refusal to ratify treaties on the global landmine ban, and its obstruction of the World Health Organization's public campaign aimed at smoking). Scholars have widely recognized and discussed the withdrawal. *See, e.g.*, David D. Caron, *Between Empire and Community: The United States and Multilateralism 2001–2003: A Mid-Term Assessment*, 21 BERKELEY J. INT'L L. 395, 395 (2003) ("The basic underlying assertion in this muddy torrent is that the United States has changed its attitude and practice toward multilateralism dramatically . . . ."); Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law*, 17 EUR. J. INT'L L. 647, 670 (2006) (describing the United States' "decidedly uneasy relationship with international legal norms and institutions" and listing examples of U.S. withdrawal); Greenberg, *supra* note 25, at 1815 (listing U.S. withdrawal from a number of multilateral treaties); Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1623–25 (2005) ("[T]he United States has recently refrained from ratifying—or has withdrawn from—numerous multilateral agreements that are widely ratified by other nations and that it at one time championed.").

95. Chander, *supra* note 4, at 1197.

96. PATRICIA JUREWICZ & KRISTIN DAWKINS, INST. FOR AGRIC. & TRADE POL'Y, THE TREATY DATABASE: A MONITOR OF U.S. PARTICIPATION IN GLOBAL AFFAIRS iii (Sept. 2004), http://www.globalpolicy.org/empire/un/2004/09database.pdf.

preting narrowly) international conventions to shore up American sovereignty.[97]

One can argue over the degree of disengagement, but certainly the United States has lost enthusiasm for multilateral legal commitments through negotiated treaties. In recent years, the United States has reversed its support for at least six major treaties,[98] including the Kyoto Protocol on Climate Change,[99] the Anti-Ballistic Missile Treaty,[100] the Optional Protocol to the Vienna Convention on Consular Relations,[101] the Biological Weapons Convention,[102] the Non-Proliferation of Nuclear Weapons Treaty,[103] and the treaty creating the International Criminal Court.[104] It has ratified only three of the ele-

97. PHILIPPE SANDS, LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES 227–28, 233 (2005) (arguing that the Bush Administration had "such scant regard for the international rule of law" that after 9/11 it believed "the rewriting of international conventions could be achieved unilaterally" and therefore would "trash an international treaty by arguing that it posed a threat to American sovereignty").

98. JUREWICZ & DAWKINS, *supra* note 96, at iii (describing the U.S. withdrawal from key international treaty regimes); *see also* Isaac Baker, *Rogue State? U.S. Spurns Treaty After Treaty*, INTER PRESS SERVICE, Dec. 8, 2005, http://www.globalpolicy.org/empire/un/2005/1208ambivalent.htm (naming several treaties rejected by the U.S. government).

99. Resnik, *supra* note 7, at 1645 (describing the U.S. withdrawal from the Kyoto Protocol).

100. Guy Taylor, *Missile-Defense Shield Fails Test Launch of Interceptor*, WASH. TIMES, Dec. 16, 2004, at A13 (noting U.S. withdrawal from the Anti-Ballistic Missile Treaty).

101. *See* Adam Liptak, *U.S. Says It Has Withdrawn From World Judicial Body*, N.Y. TIMES, Mar. 10, 2005, at A16.

102. Barbara Hatch Rosenberg, *Allergic Reaction: Washington's Response to the BWC Protocol*, ARMS CONTROL TODAY, July–Aug. 2001, at 3, 3 (discussing the United States' rejection of the Protocol to the Biological Weapons Convention); Arshad Mohammed, *Plans Focus on Germ Warfare*, PITTSBURGH POST-GAZETTE, Nov. 2, 2001, at A7 (stating that the Bush administration rejected a long-discussed plan to enforce the treaty).

103. *See, e.g.*, Erik A. Cornellier, *In the Zone: Why the United States Should Sign the Protocol to the Southeast Asia Nuclear-Weapon-Free Zone*, 12 PAC. RIM L. & POL'Y J. 233, 234 (2003); *see also* Wade Boese, *Nuclear Nonproliferation Treaty Meeting Sputters*, ARMS CONTROL TODAY, July–Aug. 2005, at 22 (describing the withdrawal); Lawrence J. Korb, *Nuclear Proliferation: Bush's Policy Endangers U.S. Security*, INT'L HERALD TRIB. (Paris), Aug. 9, 2004, at 6 (same).

104. Letter from John R. Bolton, former U.S. Under Sec'y of State for Arms Control and Int'l Sec., to Kofi Annan, Sec'y-Gen. of the United Nations (Apr. 27, 2002), 41 I.L.M. 1014. Immediately after the Bush Administration took office a flood of commentary sought to pressure Bush to unsign the treaty. *See, e.g.*, John R. Bolton, *Unsign That Treaty*, WASH. POST, Jan. 4, 2001, at A21; Betsy Pisik, *Conservatives Prepare to Contest Global Court: View Treaty as Threat to U.S. Military*, WASH. TIMES, Jan. 8, 2001, at A1; *see also* Cuéllar,

ven key environmental treaties, and only five of the twelve major human rights treaties.[105] As one commentator bluntly puts it: "the list of U.N. treaties and conventions that Washington has not signed or has actively opposed goes on and on."[106] In fact, "only the free-trade agreements—provided they are limited to trade and do not include the environment, labor issues, or human rights" have "pass[ed] muster . . . because they are thought to serve American interests."[107]

The disengagement is even more marked when U.S. practices are compared with those of other states. The United States is the only country aside from Somalia (which currently has no sitting government) that has failed to ratify the Convention on the Rights of the Child.[108] The United States was one of only seven countries that voted against the Rome Statute of the International Criminal Court.[109] And it was one of only two countries that voted against UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions.[110] Strikingly, since World War II, the United States has joined as a party "only 60 percent of the treaties deposited with the UN Secretary-General that have been ratified by more than

*supra* note 35, at 1597.

105. JUREWICZ & DAWKINS, *supra* note 96, at iv; *see also* Taft, *supra* note 85, at 504 ("The United States did not ratify any of the major international treaties it had declined to join in the previous decade. Nor, with a few exceptions involving cooperation in law enforcement, did it engage in and promote the negotiation of conventions on new subjects.").

106. Baker, *supra* note 98; *see also* Brunnée, *supra* note 51, at 624 (describing the American withdrawal from international environmental treaties); John E. Noyes, *The United States, the Law of the Sea Convention, and Freedom of Navigation*, 29 SUFFOLK TRANSNAT'L L. REV. 1, 1–2 (2005).

107. Spiro, *The New Sovereigntists*, *supra* note 1, at 10; *see also* SANDS, *supra* note 97, at 21 (arguing that despite withdrawal from other international laws, the United States "is broadly committed to international free trade rules" and "is strongly committed to the use of international laws to protect the rights of American investors overseas, and to rules protecting intellectual property rights"); Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 389 (2005) (noting how treaties of an "economic character" have been viewed favorably by the United States); Rubenfeld, *supra* note 4, at 1983 ("At the same time, however, in one major domain, the United States has been as consistent and devoted a champion of international law as any other country: economics.").

108. JUREWICZ & DAWKINS, *supra* note 96, at iv.

109. Baker, *supra* note 98.

110. *Id.*

half of all states," while the other G-8 members are party to 93 percent of them.[111]

Contrary to some popular misconceptions, this is not a phenomenon unique to the Bush Administration. Anti-internationalism "runs deep in the American political tradition."[112] Although certainly exaggerated during the George W. Bush Administration[113]—and in particular in its war on terrorism[114]—the United States' uneasy relationship with multilateral treaties began in the mid-1990s.[115] In the early 1990s, on

111. Krisch, *supra* note 107, at 388.

112. Spiro, *The New Sovereigntists*, *supra* note 1, at 9; *see also* Krisch, *supra* note 107, at 389 ("U.S. reluctance to international treaties has strong cultural roots, goes back to the late 18th century when the country was still weak, and finds expression in the high hurdles erected by the U.S. Constitution for treaty ratification.").

113. Greenberg, *supra* note 25, at 1814–15 ("The administration of President George W. Bush stands out as a uniquely aggressive and extreme proponent of a normative realist paradigm in international affairs. This paradigm is trumpeted to explain and justify U.S. actions to abandon, terminate, or sabotage a number of the most prominent bilateral and multilateral treaties in effect or development for decades."); Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2354 (2006) ("America's new diplomatic strategy emphasizes strategic unilateralism and tactical multilateralism, characterized by a broad antipathy toward international law and global regime-building through treaty negotiation."); *see also* Global Policy Forum, U.S., UN, and International Law, http://www.globalpolicy.org/empire/un/unindex.htm (last visited Dec. 1, 2008) ("The Bush Administration has embarked on a strategy of hard line unilateralism, disregarding the UN and international law.").

114. *See* Bryant G. Garth, *Rebuilding International Law After the September 11th Attacks: Contrasting Agendas of High Priests and Legal Realists*, 4 LOY. U. CHI. INT'L L. REV. 3, 3–4 (2006) (explaining how after 9/11, the Bush Administration believed "[i]nternational law needed to be put in the service of the War on Terror or ignored" and detailing a "series of anti-international law decisions"); *see generally* SANDS, *supra* note 97, at 227 (criticizing the United States for its withdrawal from international norms); Michael C. Davis, *International Intervention in an Age of Crisis and Terror: U.N. Reform and Regional Practice*, 15 TUL. J. INT'L & COMP. L. 1, 20–21 (2006) (describing the United States' "disregard for international law" in a range of contexts and in particular in the war against terrorism).

115. Thomas M. Franck, Editorial Comment, *Taking Treaties Seriously*, 82 AM. J. INT'L L. 67, 67 (1988) (explaining that the "United States seems increasingly content to be perceived by other nations as indifferent to its most solemn treaty obligations"); Detlev F. Vagts, Editorial Comment, *Taking Treaties Less Seriously*, 92 AM. J. INT'L L. 458, 458–60 (1998) (describing an "alarming exacerbation" of the United States' failure to fully respect its treaty obligations in the 1990s); *see also* JUREWICZ & DAWKINS, *supra* note 96, at iv (explaining that the retreat from engaging with international treaty law "predates the presidency of George W. Bush" and is a trend that has occurred "under both Democratic and Republican leadership"); Taft, *supra* note 85, at 504 (arguing that although an "acceleration of international cooperation" was expected after the Cold War ended, the "1990s revealed a loss of enthusiasm in

the heels of the Cold War, a great enthusiasm for international law and institutions existed.[116] But by the mid-1990s, this optimism subsided. The United States declined to become a party to a number of key conventions,[117] including the Convention on the Law of the Sea (which had been revised specifically to address U.S. concerns),[118] the Basel Convention,[119] the Kyoto Pro-

the United States for multilateral approaches"); James Traub & Joanne J. Meyers, The Best Intentions: Kofi Annan and the UN in the Era of American World Power, (Nov. 2006), http://www.globalpolicy.org/empire/un/2006/1115annanbook.htm ("The critique of the United States in the United Nations, as being scornful of the United Nations and of its obligations there, long predates the Bush Administration, but specifically its modern form really comes from the mid-1990s . . . ."); *cf.* Rubenfeld, *supra* note 4 (arguing that American unilateralism with international law and foreign relations is hardly new, and not unique to the Bush administration).

116. It was in the summer of 1989 that Francis Fukuyama famously declared the "end of history." Francis Fukuyama, *The End of History?*, NAT'L INT., Summer 1989, at 3, 3 (trumpeting, in hindsight mistakenly, the triumph of democracy); *see also* George H. W. Bush, President of the United States, Address to Joint Session of Congress and the Nation: Toward a New World Order (Sept. 11, 1990), *available at* http://www.sweetliberty.org/issues/war/bushsr.htm (declaring the beginning of a "new world order"); *cf.* Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 595 (2007) (noting how the end of the Cold War suggested to international legal theorists that the international system was undergoing a process of economic and political transformation that would soon result in a more integrated, democratized and egalitarian global legal order); W. Michael Reisman, *International Law After the Cold War*, 84 AM. J. INT'L L. 859, 860–61 (1990) (arguing that the Cold War "deformed the traditional international law" and how some suppressed practices could now be revived).

117. Taft, *supra* note 85, at 504, 508 ("The United States's increasing reluctance to become a party to treaties establishing new international legal commitments, its recent enthusiasm for Security Council resolutions imposing legal obligations on states designed to combat terrorists and the proliferation of weapons of mass destruction, and its selective approach to the application of customary laws of war in its conflict with al Qaeda all represent significant departures from its practice in the decades of the Cold War."); *see also* SANDS, *supra* note 97, at 227 (noting that the Bush Administration's retreat from international law was "not so much a change of values as a ratcheting up of efforts to tap into a rich seam of skepticism which had lain dormant for much of the twentieth century, slowing but not halting the incoming tide of global commitments"); Davis, *supra* note 114, at 18–19 ("The trend of projecting American power to advance a perception of the common good with uncertain regard for international obligations was, it should be acknowledged, already on display in the Kosovo intervention of the Clinton Administration and NATO.").

118. Taft, *supra* note 85, at 504; *see also* BENJAMIN FRIEDMAN & DANIEL FRIEDMAN, BIPARTISAN SECURITY GROUP, HOW THE LAW OF THE SEA CONVENTION BENEFITS THE UNITED STATES (2004), http://www.gsinstitute.org/docs/11-20-04_UNCLOS.pdf (describing how President Reagan refused to sign the United Nations Convention on the Law of the Sea because Part XI of the

tocol,[120] the Comprehensive Test Ban Treaty,[121] several human rights conventions,[122] and the Rome Statute creating the International Criminal Court.[123] And even if previous administrations were more willing to undertake international obligations, they frequently placed conditions on those obligations.[124]

The American resistance often manifested itself in attempts to limit obligations flowing from treaties through the frequent use of reservations.[125] In the 1990s the United States

treaty required U.S. companies to give away to developing countries technologies developed to extract materials from the seabed). After twelve years of negotiation, an agreement was reached in 1994 that "repealed the treaty's mandatory technology transfer provisions" and "allow[ed] the United States to veto any proposed rules relating to the distribution of ISA revenues, were it to join the Convention." *Id.* at 2. Although President Clinton signed the treaty, the Senate has not yet ratified it. *Id.*

119. The Basel Convention entered into force in 1992. The "United States remains the only OECD country not to have ratified the treaty." Brunnée, *supra* note 51, at 624.

120. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998).

121. Comprehensive Test Ban Treaty, Sept. 24, 1996, 35 I.L.M. 1439 (1996); *see also* Warren Hoge, *Blix Faults U.S. Over Failure to Halt Spread of Atomic Arms*, INT'L HERALD TRIB. (Paris), June 2, 2006, at 8.

122. *See, e.g.*, United Nations General Assembly: Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography, May 16, 2000, 39 I.L.M. 1285; United Nations Commission on Human Rights: Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, Apr. 10, 1980, 19 I.L.M. 891.

123. Jean Galbraith, *The Bush Administration's Response to the International Criminal Court*, 21 BERKELEY J. INT'L L. 683, 684–86 (2003) (describing the Clinton Administration's "ambivalent engagement" with the development of the ICC, and noting that President Clinton waited and did not sign the treaty until the last possible day on December 31, 2000).

124. Elizabeth M. Bruch, *Whose Law is It Anyway? The Cultural Legitimacy of International Human Rights in the United States*, 73 TENN. L. REV. 669, 672 n.13 (2006); *see also* SANDS, *supra* note 97, at 14 (describing how in the 1990s for the United States, "[t]reaties were negotiated, but not signed [and] [m]any that were signed were not ratified"); Brunnée, *supra* note 51, at 648 (noting that the "ratification trajectory of the Bush administration is no worse than that of preceding administrations"); David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 139–42 (1999) (describing the history of U.S. ratification of human rights treaties).

125. Krisch, *supra* note 107, at 388–89 ("[T]he practice of reservations is so important to the U.S. that the Senate has urged the President not to accept any treaty provision excluding them."); *see also* JOSEPH D. BECKER, THE AMERICAN LAW OF NATIONS: PUBLIC INTERNATIONAL LAW IN AMERICAN COURTS 41 (2001) ("In [the 1990s] the United States . . . adopted the practice of attaching reservations (or their equivalent) to ratified treaties . . . ."); Margaret E. McGuinness, Medellín*, Norm Portals, and the Horizontal Integration*

was much slower to ratify treaties compared to previous decades.[126]

This is not to criticize the United States for its refusal to participate in a particular treaty regime. Nor is it to suggest that international law does not play a significant role in U.S. relations; the United States regularly uses international law (at least when attempting to influence other countries' behavior).[127] The point is for now simply a descriptive one: the last decade witnessed a dramatic change of perspective.[128] Overall the United States (at least the executive and legislative branches) has disengaged from traditional international lawmaking, and is increasingly reluctant to become a party to treaties establishing new international commitments. As one author notes, "international law relating to a number of subjects seems to be neither as easy to make nor as important to make for the United States, at least in the near term, as it was previously."[129]

### B. THE RISE OF EXTRATERRITORIALITY

This disengagement from international law left a vacuum. As the United States withdrew from international treaties and the institutions created by those treaties, international lawyers turned elsewhere to find solutions to international challenges, and to project American influence. The need to do so was felt acutely as globalization increased the likelihood and intensity of international conflicts.[130] As lawyers turned to the courts,

*of International Human Rights*, 82 NOTRE DAME L. REV. 755, 759 (2006) ("[T]he United States . . . has become more sophisticated in its use of reservations, understandings and declarations to limit its obligations under the central human rights regimes . . . .").

126. Brunnée, *supra* note 51, at 648.

127. *See* SEAN D. MURPHY, 2 UNITED STATES PRACTICE IN INTERNATIONAL LAW 2002–2004, at 1 (2006) ("[D]uring 2002–2004, the United States continued in its role as a critical player with respect to international legal initiatives and as a major supporter of a variety of international organizations . . . ."); *cf.* Koh, *supra* note 31, at 1487 ("[T]he United States remains the only superpower capable, and at times willing, to commit real resources and make real sacrifices to build, sustain, and drive an international system committed to international law, democracy, and the promotion of human rights."); Rubenfeld, *supra* note 4, at 1972 (describing "America's can't-live-with-it, can't-kill-it relationship to international law" and the apparent inconsistency of the U.S. position towards international law).

128. SANDS, *supra* note 97, at 21 (noting a "wholesale change of approach").

129. Taft, *supra* note 85, at 508.

130. *See* David J. Gerber, *Prescriptive Authority: Global Markets as a Challenge to National Regulatory Systems*, 26 HOUS. J. INT'L L. 287, 298 (2004)

the U.S. legal system began to export, if not globalize, its brand of justice.[131] And then—quite recently and often unnoticed—other countries began to follow suit.[132]

1. Transnational Litigation in the United States

Extraterritoriality[133] concerns the circumstances under which one state's laws can appropriately apply to conduct occurring outside that state's territory.[134] According to the United Nation's, "traditionally, the exercise of jurisdiction by a state was "primarily limited to persons, property and acts within its territory and to relatively exceptional situations in which its nationals travelled beyond its borders."[135] A state's power—and

("[Global markets] enhance pressure on [jurisdictional law] by increasing the likelihood, intensity, and potential consequences of conflicts among states and, to a growing extent, among international and transnational institutions.") For further discussion on the impact of globalization, see THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE (1999).

131. Paul B. Stephan, *A Becoming Modesty—U.S. Litigation in the Mirror of International Law*, 52 DEPAUL L. REV. 627, 628 (2002).

132. *See infra* notes 191–211 and accompanying text. As a general matter, the number of transnational cases of all kinds in U.S. courts continues to grow rapidly. Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1459 (1991) (describing increased international litigation in U.S. courts); *see also* Eugene J. Silva, *Practical Views on Stemming the Tide of Foreign Plaintiffs and Concluding Mid-Atlantic Settlements*, 28 TEX. INT'L L.J. 479, 480 (1993) (describing the sustained growth of multinational litigation); *cf.* Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 42–46 (2006) (describing the growth of international litigation involving foreigners in U.S. courts).

133. *See supra* note 15. For a detailed discussion of the extraterritorial application of U.S. laws, see Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1 (1992).

134. Envtl. Def. Fund, Inc. v. Massey, 986 F.2d 528, 530 (D.C. Cir. 1993) ("Extraterritoriality is essentially, and in common sense, a jurisdictional concept concerning the authority of a nation to adjudicate the rights of particular parties and to establish the norms of conduct applicable to events or persons outside its borders."); *see also* VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 8:1 (2d ed. 2008) ("Extraterritorial jurisdiction seeks to define those instances where the United States will apply its laws to international transactions, while recognizing the potential conflict with foreign nations.").

135. U.N. Int'l Law Comm'n, *Report of the International Law Commission*, Annex E, at 516, U.N. Doc. A/61/10 (2006) [hereinafter *International Law Commission*], *available at* http://untreaty.un.org/ilc/reports/2006/2006report.htm; *see also* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 563–67 (4th ed. 2007) (describing traditional international law limitations on extraterritoriality); CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 625 (2d ed. 2005) ("[T]he Supreme Court has applied a presumption against extraterritoriality since

in turn, the power of its courts—ended at the border.[136] The reason for this was sound: a state's extension of its lawmaking authority[137] into the territory of another state "contravene[s] [that] state's sovereignty".[138] That states enjoy exclusive authority to regulate within their borders is a cornerstone of classical international law.[139] Thus, historically, "regulation of extraterritorial conduct was viewed as illegitimate."[140]

For a long time these principles were respected in the United States. Domestic law applied only within state borders

early in the nation's history.").

136. *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."), *abrogated by* United States v. Sisal Sales Corp., 274 U.S. 268 (1927); Case of S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) No. 10, at 18–19 (Sept. 7) ("Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention."). The territorial limitation has not always existed. In England, prior to the creation of the monarchial state, no concept of territorial sovereignty existed. *See* M'Gonigle, *supra* note 52, at 166–67; John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT'L ORG. 139, 149–50 (1993).

137. This is known as prescriptive jurisdiction, or sometimes legislative jurisdiction. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401(a) (1987) (defining prescriptive jurisdiction).

138. Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 127 (2007).

139. *Id.*; *see also* John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782, 786–87 (2003) (describing the concepts of state sovereignty and independence). For a discussion of internal and external sovereignty, see Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1921–23 (2003). The United Nations Charter recognizes the right to be free from interference from other states. U.N. Charter art. 2, para. 4 (providing that states have an obligation to respect the "territorial integrity or political independence" of other states).

140. Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251, 268 (2006). As Professor Dubinsky notes, the territorial limits on the power of courts to adjudicate disputes involving conduct outside a nation's borders has had "many manifestations: the dominance of the doctrine of *lex loci delicti* (the law of the place of wrong) in choice of law, the presumptive territorial limits of prescriptive jurisdiction, the breadth of the act of state doctrine, and the great stinginess with which res judicata and collateral estoppel were applied across borders." Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211, 255 (2005).

to persons within the United States,[141] as did constitutional protections.[142] And even when the strict prohibition against regulating foreign conduct eventually eroded, a strong presumption remained that U.S. laws would not apply outside U.S. borders.[143] In fact, Justice Holmes proclaimed this presumption almost a century ago: "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[144] Accordingly, U.S. courts traditionally would be very reluctant to find a U.S. law that applied extraterritorially.[145]

Today, however, the use of U.S. domestic law to regulate conduct occurring beyond U.S. borders has become increasingly common.[146] According to Professor Krisch, the United States

141. Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824) ("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction."); *see also* Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812) (limiting the legislative powers to control conduct within a nation's territorial borders); Rose v. Himely, 8 U.S. (4 Cranch) 241, 279 (1807) (taking a territorial approach to prescriptive jurisdiction), *partially overruled by* Hudson v. Guestier, 10 U.S. (6 Cranch) 281 (1810). For a discussion of the presumption against U.S. domestic laws applying extraterritorially from a U.S. perspective, see William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85 (1998); Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598 (1990).

142. *See, e.g.*, Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2506 (2005) ("[T]he protections of the Bill of Rights are not untethered from the territory of the United States. Rather, they are spatially bound: operative only within the fifty states and other territories . . . ."). For a general discussion of the limitations of constitutional protections outside territorial boundaries, see Parrish, *supra* note 132, at 28–41.

143. *See* EEOC v. Arabian Oil Co., 499 U.S. 244, 248 (1991), *partially superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a) (codified as amended at 42 U.S.C. § 2000e(f) (2006)), *as recognized in* Landgraf v. USI Film Products, 511 U.S. 244 (1994); Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) (explaining that the presumption against extraterritorial application of U.S. laws is a canon of statutory construction); Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356–59 (1909) (explaining the strong presumption against extraterritorial application as a means to prevent the violation of another nation's sovereignty), *abrogated by* United States v. Sisal Sales Corp., 274 U.S. 268 (1927). For an in depth discussion of the history of extraterritorial jurisdiction under domestic law, see Austen L. Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455 (2008).

144. *Am. Banana Co.*, 213 U.S. at 356; *see also* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) ("[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.").

145. *See* NANDA & PANSIUS, *supra* note 134, § 8:3.

146. *International Law Commission*, *supra* note 135, at 516; *cf.* Jenny S.

"took an early lead in applying its own law to situations with little connection to itself other than a widely defined 'effect,' and it has succeeded in reshaping (or at least destabilizing)" traditional jurisdictional constraints.[147] A whole host of grounds for exercising extraterritorial jurisdiction now exists in both international and domestic law.[148] Although the traditional limits on extraterritorial laws began loosening in the early decades of the twentieth century,[149] the number of transnational cases—where domestic laws are applied to govern extraterritorial conduct—has dramatically exploded only recently.[150] In fact, that U.S. courts extraterritorially apply U.S. and international law[151] to solve transboundary disputes is now unexceptional.[152] This is true for both lawsuits concerning transnation-

Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 430 (2003) ("National courts, too, are increasingly being called upon to apply international law and to interact with these international courts and with the courts of other nations.").

147. Krisch, *supra* note 107, at 403; *see also* Ugo Mattei & Jeffrey Lena, *U.S. Jurisdiction Over Conflicts Arising Outside of the United States: Some Hegemonic Implications*, 24 HASTINGS INT'L & COMP. L. REV. 381, 382 (2001) ("[T]he expansionist thrust of the jurisdiction of U.S. courts . . . may be viewed as a sort of legal imperialism . . . .").

148. *See* LOUISE ELLEN TEITZ, TRANSNATIONAL LITIGATION § 2-4(a) (1996) (listing traditional grounds for the exercise of prescriptive jurisdiction).

149. BORN & RUTLEDGE, *supra* note 135, at 567; Born, *supra* note 133, at 1 ("During the course of the twentieth century, territorial limits on national jurisdiction gradually eroded.").

150. *See* Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. PA. J. INT'L ECON. L. 1297, 1300 (2004) (describing the expanding number of transnational cases); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 186–91 (1996) (describing the rise of transnational litigation and the broader theory); *see generally* R.E. FALVEY & P.J. LLOYD, AN ECONOMIC ANALYSIS OF EXTRATERRITORIALITY 1 (1999) ("Some governments apply national laws extraterritorially and these applications are increasing . . . ."). For an interesting discussion of transnational law, see Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L L. 65 (1996).

151. *See* Stephan, *supra* note 131, at 628, 631–39 (describing how U.S. courts have sought to widen their international influence through "shifts in doctrines such as personal jurisdiction, *forum non coveniens*, comity, and choice of law"). For further discussion of extraterritoriality in general, see BORN & RUTLEDGE, *supra* note 135; NANDA & PANSIUS, *supra* note 134.

152. In recent years, U.S. courts have extraterritorially applied a wide range of domestic laws. Phillip B. Dye et al., *International Litigation*, 40 INT'L LAW. 275, 299–303 (2006) (listing cases in the past year where U.S. courts have "considered extraterritoriality in disputes involving the federal habeas corpus statute, as well as intellectual property, antitrust, securities, employment, disabilities, tort claims, criminal law, and immigration issues"). For an early description of the United States' use of extraterritorial laws, see V. Rock Grundman, *The New Imperialism: The Extraterritorial Application of United*

al public law[153] and lawsuits concerning private regulatory law.[154]

The move toward U.S. domestic courts serving as fora for international matters (rather than their international counterparts) is significant. A mindset has developed among many U.S. lawyers and policymakers that the extraterritorial application of American law is not only acceptable, but preferable.[155] Instead of turning to international treaties or international institutions to solve international challenges, parties increasingly see domestic litigation as a more immediate and effective means of obtaining redress for global harms.[156] Use of extraterritorial domestic law is also a way to exert American influence without having to worry about the constraints and mutual obligations that international treaties impose[157]—a particularly strong form of American exceptionalism.[158] The trend is widespread. From antitrust,[159] to copyright,[160] to securities regula-

*States Law*, 14 INT'L LAW. 257, 257–66 (1980).

153. For a general description of transnational public law, see Koh, *Transnational Public Law Litigation*, *supra* note 11, at 2347.

154. *See* Buxbaum, *supra* note 140, at 253–56 (analyzing the development of transnational regulatory law).

155. McGinnis & Somin, *supra* note 4, at 1246 (arguing that American law is preferable to raw international law). For the idea that law can create a mindset over time, see Paul Schiff Berman, *Dialectical Regulation, Territoriality, and Pluralism,* 38 CONN. L. REV. 929, 945 (2006) ("[T]he mere assertion of jurisdiction and articulation of a norm (even without literal enforcement power) has such great impact that it effectively alters legal consciousness over time."); Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265, 1268 (2006) (arguing how law can effect "legal consciousness" over time).

156. *See* Krisch, *supra* note 84, at 156, 162–63 (explaining the use of U.S. courts as international courts, and how from a "U.S. perspective, law is an important device for the regulation of international society—as long as it is not applied to itself").

157. *See id.*

158. *See* Hathaway, *supra* note 32, at 132 ("American [exceptionalism] is . . . used to 'plead the authority of its internal law to mitigate its international legal obligations.' . . . The United States simultaneously asserts the right to lead, but also to be exempted from the rules it promotes." (citing Henry J. Richardson, *The Execution of Angel Breard by the United States: Violating an Order of the International Court of Justice*, 12 TEMP. INT'L & COMP. L.J. 121, 127 (1998))).

159. Salil K. Mehra, *Extraterritorial Antitrust Enforcement and the Myth of International Consensus*, 10 DUKE J. COMP. & INT'L L. 191, 191–92 (1999) (arguing that due to changes in the law in the 1990s U.S. antitrust laws will increasingly address overseas conduct); *see also* Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 159 (1999) ("Extraterritorial enforcement of antitrust and competition laws has become routine in both the United States and the European Union.").

tion,[161] to trademarks and trade names,[162] to intellectual property,[163] to corporate law and governance,[164] to bankruptcy and tax,[165] to criminal laws,[166] to environmental laws,[167] to civil

160. Jane C. Ginsburg, *Extraterritoriality and Multiterritoriality in Copyright Infringement*, 37 VA. J. INT'L L. 587, 592–99 (1997) (describing recent examples of the extraterritorial application of copyright law).

161. *See* NANDA & PANSIUS, *supra* note 134, §§ 8:19–24. For further discussion on the extraterritorial application of securities regulation, see Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Laws*, 17 NW. J. INT'L L. & BUS. 207 (1996); Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV 903 (1998); Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 COLUM. J. TRANSNAT'L L. 677 (1990).

162. *See* NANDA & PANSIUS, *supra* note 134, § 8:12.

163. Curtis A. Bradley, *Extraterritorial Application of U.S. Intellectual Property Law Territoriality Panel Principal Paper: Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 506–07 (1997) (describing the increasing extraterritorial application of U.S. intellectual property laws); *see also* Katherine E. White, *The Recent Expansion of Extraterritoriality in Patent Infringement*, 11 UCLA J.L. & TECH. 2, 2 ("The rapid pace of globalization has intensified the desire to expand the territorial reach of United States law to determine patent infringement."). For recent examples of cases, see *Eolas Techs., Inc. v. Microsoft Corp.*, 399 F.3d 1325 (Fed. Cir. 2005) (finding patent infringement where exported software components were used solely abroad); *AT&T Corp. v. Microsoft Corp.*, 414 F.3d 1366 (Fed. Cir. 2005) (holding a copier liable for U.S. patent infringement for foreign copying of U.S.-made software), *rev'd*, 127 S. Ct. 1746 (2007); *NTP, Inc. v. Research in Motion, Ltd.*, 418 F.3d 1282 (Fed. Cir. 2005) (finding patent infringement in the U.S. even though part of the patented system was located in Canada).

164. Detlev F. Vagts, *Extraterritoriality and the Corporate Governance Law*, 97 AM. J. INT'L L. 289, 289–94 (2003) (describing the extraterritorial application of the Sarbanes-Oxley Act). For further analysis of the extraterritorial application of corporate law, see Ronald E. Bornstein & N. Elaine Dugger, *International Regulation of Insider Trading*, 1987 COLUM. BUS. L. REV. 375 (1987); Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 NW. U. L. REV. 523 (1993); and Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT'L & COMP. L.J. 123 (1996).

165. Buxbaum, *supra* note 140, at 278–80 (describing the extraterritorial application of U.S. law in tax revenue litigation); *see also* Reuven S. Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 COLUM. J. TRANSNAT'L L. 5, 17–24 (2003) (describing extraterritorial laws in the corruption, bankruptcy, and tax contexts).

166. Colangelo, *supra* note 138, at 121 ("[T]he United States now extends aggressively its criminal laws to activity occurring halfway around the globe."). For examples of cases concerning the extraterritorial application of U.S. criminal law, see *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003); *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991). For a specific analysis of the application of RICO laws, see Kelly Christie, *To Apply or Not to Apply:*

rights,[168] to labor[169]—the list goes on[170]—the United States has utilized prescriptive (i.e., legislative) jurisdiction to regulate conduct occurring abroad.[171] U.S. domestic laws, applied extra-

*Extraterritorial Application of Federal RICO Laws*, 8 FLA. J. INT'L. L. 131 (1993).

167. *See* Austen L. Parrish, *Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. REV. 363, 393–95 (2005) (describing the extraterritorial application of U.S. environmental laws); *see also* Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1077–79 (9th Cir. 2005) (holding that the imposition of CERCLA liability on a Canadian corporation was not an extraterritorial application of U.S. law even though the company's release of pollutants occurred entirely within Canada). *See generally* Francesco Francioni, *Extraterritorial Application of Environmental Law*, *in* EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE 122 (Karl M. Meessen ed., 1996) (arguing that the extraterritorial application of U.S. environmental laws supports fundamental human rights).

168. *See, e.g.*, NANDA & PANSIUS, *supra* note 134, § 8:3 ("In 1984 Congress expanded the ADEA to permit limited extraterritorial application to U.S. citizens working for U.S. companies or their subsidiaries."); *cf.* Mattei & Lena, *supra* note 147, at 381 (describing "Holocaust claims" lawsuits where the "claims are temporally and spatially remote from American courts").

169. *See* Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 129–30 (2005) (extending the Americans with Disabilities Act of 1990 to encompass foreign-flag vessels in U.S. waters); Jose v. M/V Fir Grove, 801 F. Supp. 358, 373 (D. Or. 1992) (finding that Congress intended the wage provisions of the U.S. Shipping Act to apply to foreign seamen); *see also* Symeon C. Symeonides, *Cruising in American Waters:* Spector*, Maritime Conflicts, and Choice of Law*, 37 J. MAR. L. & COM. 491, 503–10 (2006) (discussing the extraterritoriality issues raised by the Court's decision in *Spector*, 545 U.S. 119).

170. NANDA & PANSIUS, *supra* note 134, § 8:3 ("There are many laws of the United States that have or may have extraterritorial effect. A few of these laws that have invited comment are the Foreign Corrupt Practices Act (dealing with bribery), the Export Administration Act of 1979 (dealing with boycotts), the Iranian Assets Control Regulations (dealing with response to the hostage crisis), the Civil Rights Act, the National Environmental Policy Act, and drug enforcement laws."); *see also* Tonya L. Putnam, Courts Without Borders: The Domestic Sources of U.S. Extraterritorial Regulation (Mar. 5, 2005) (unpublished manuscript presented at the annual meeting of the International Studies Association, Hilton Hawaiian Village, Honolulu, Hawaii) (on file with author) (noting that, although there is a variation in U.S. extraterritorial regulatory behavior, U.S. courts have "applied domestic statutes extraterritorially to break international trading cartels; to compensate victims of torture ordered by foreign military officials; to restrict the re-export of sensitive materials and technologies; to protect U.S. trademarks; and to safeguard migratory species").

171. For an early discussion of the methodological challenges associated with extraterritorial application of U.S. law, see Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodical and Constitutional Appraisal*, LAW & CONTEMP. PROBS., Summer 1987, at 11, 11; *see also* Grundman, *supra* note 152 (evaluating the receptiveness of foreign governments to extraterritorial application of U.S. laws in the late 1970s).

territorially, are now routinely used to influence international policy.

To be certain, the extraterritorial application of domestic law is not an entirely new phenomenon. U.S. courts have long heard cases involving foreign elements.[172] What is new is the extent to which it has occurred in all areas of the law, in all areas of the world, and how litigants now instinctively turn to domestic courts to solve international problems. In some contexts, domestic law as an instrument of international governance is beginning to replace international law. And with the globalization of commerce, communications, crime, human rights, and other areas, the prevalence of cases where domestic courts meddle with extraterritorial matters has grown.[173]

Human rights litigation and the development of universal jurisdiction provide one example. Before the 1980s, the idea that foreign nationals could sue or be sued in U.S. courts for conduct occurring beyond U.S. territory was almost unheard of.[174] In the 1980s and 1990s, however, alternatives developed to the traditional model of human rights enforcement.[175] Significant changes occurred in a relatively short period of time,[176] as human rights advocates made efforts to "deploy domestic courts around the world to implement the human rights policies not only of their own countries but of the international community as a whole."[177] Over time, U.S. courts came to accept that fo-

172. Martinez, *supra* note 146, at 441.

173. *Id.*

174. *See* Slaughter & Bosco, *supra* note 75, at 104. The change began with the now-famous 1980 *Filártiga* decision by the Second Circuit U.S. Federal Court of Appeals, which involved a suit by the family of a Paraguayan tortured to death by the police against the torturer, who was living in the United States. Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980); *see also* Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 173–77 (2004) (describing the case and its progeny).

175. *See, e.g.*, Aceves, *supra* note 11, at 139–47 (describing the development of transnational law litigation); William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcemen*t, 24 MICH. J. INT'L L. 1 (2002).

176. Mark Gibney, *Human Rights Litigation in U.S. Courts: A Hypocritical Approach*, 3 BUFF. J. INT'L L. 261, 269 (1996) ("It is remarkable to think that it was only slightly more than a decade and a half ago that the prospects of bringing to trial torturers and murderers from Paraguay or Ethiopia or Indonesia or Guatemala or Haiti or anywhere else seemed completely out of the realm of the possibility. Much has changed in a relatively short period of time. The U.S. has now opened its courts to those who have suffered human rights abuses . . . .").

177. Dubinsky, *supra* note 140, at 216.

reigners could sue for violations of certain universal international law norms.[178] Under the Alien Tort Statute and other statutes,[179] liability was imposed on a wide range of actors, from commanding officers, foreign government officials, U.S. government officials, and corporations.[180] And human rights litigation underwent "significant expansion, both in terms of the number of cases filed as well as the scope of the claims raised."[181] Human rights activists and scholars have actively encouraged this growth.[182]

This phenomenon has also occurred in environmental law. For many environmentalists, international environmental lawmaking should no longer be the exclusive business of nation-states.[183] In a fast-paced global economy, international environmental treaties are seen as too cumbersome and slug-

178. *See* Stephens, *supra* note 174, at 174.

179. 28 U.S.C § 1350 (2000). The Alien Tort Statute was enacted in 1789 as part of the first Judiciary Act. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77. Three other statutes also provide jurisdiction for U.S. courts to hear human rights claims: the Torture Victim Protection Act, an exception to the Foreign Sovereign Immunities Act, and a provision of an antiterrorism initiative. *See* 28 U.S.C. § 1350; 18 U.S.C. § 2333; 28 U.S.C. § 1330; 28 U.S.C. § 1602. *See generally* Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433, 438–39 (2002) (describing the modern statutes that "provide jurisdiction for human rights claims in U.S. courts").

180. Stephens, *supra* note 174, at 437. Generally, however, the U.S. and its employees can not be sued under the Alien Tort Statute, and therefore human rights litigation is asymmetrical—"by the United States, but not against it." Krisch, *supra* note 84, at 163.

181. Bradley, *supra* note 20, at 458; *see also* Henry J. Steiner, *Three Cheers for Universal Jurisdiction—Or Is It Only Two?*, 5 THEORETICAL INQUIRIES J. 199, 210–11 (2004) (describing the "burst of activity in prosecutions based on universal jurisdiction"). *But see* Curtis F. Doebbler, *An American Legend: The Overlegalization of Human Rights*, 96 AM. SOC'Y INT'L L. PROC. 381, 382 (2002) (noting that human rights litigation "is still crawling" in parts of the world where it is needed most).

182. *See* Drezner, *supra* note 4, at 325 ("Activists have tried to use [the existence of UN and other human rights] treaties to argue that U.S. courts should apply human rights law beyond its borders."); *see, e.g.*, Gregory G.A. Tzeutschler, Note, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 COLUM. HUM. RTS. L. REV. 359 (1999) (arguing in favor of transnational litigation aimed at multinationals).

183. *See* M'Gonigle, *supra* note 52, at 173; Russell A. Miller, *Surprising Parallels Between* Trail Smelter *and the Global Climate Change Regime*, *in* TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION 168 (Rebecca M. Bratspies & Russell A. Miller eds., 2006) ("[T]he rise . . . of nonstate actors suggests a new world order in which the nation state's Westphalian prerogative is increasingly suspect.").

gish.[184] From climate change litigation,[185] to transboundary pollution,[186] to shared management of natural resources,[187] international environmental lawmaking has increasingly occurred at the subnational or national level in U.S. courts.[188] Many environmentalists cheer these developments, hoping they will encourage an environmental race to the top.[189] Given the preva-

184. *See* Paul Schiff Berman, *Conflict of Laws, Globalization, and Cosmopolitan Pluralism*, 51 WAYNE L. REV. 1105, 1134–35 (2005) (praising transnational common-law adjudication because "treaties . . . are cumbersome and slow to adjust to changing technologies or social conditions"); Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 259 (1992) (stating that the treaty process causes international environmental law to be "slow, cumbersome, expensive, uncoordinated and uncertain"); James Gustave Speth, Lecture, *International Environmental Law: Can It Deal with the Big Issues?*, 28 VT. L. REV. 779, 787 (2004) (describing the cumbersome treaty-making process).

185. *See* WIL BURNS & HARI OSOFSKY, ADJUDICATING CLIMATE CHANGE: SUBNATIONAL, NATIONAL, AND SUPRANATIONAL RESPONSES (2007); Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH. U. L.Q. 1789, 1819–27 (2005) (analyzing climate change regulations in Minnesota and Victoria, Australia); *see also* Symposium, *The Role of State Attorneys General in National Environmental Law Policy*, 30 COLUM. J. ENVTL. L. 403, 404 (2005) (describing state attorneys' general filing of innovative lawsuits to combat groundwater pollution).

186. *See, e.g.*, Noah D. Hall, *Transboundary Pollution: Harmonizing International and Domestic Law*, 40 U. MICH. J.L. REFORM 681, 723–36 (2007) (using the U.S.-Canada example to examine the use of domestic law as a mechanism for addressing transboundary pollution); Parrish, *supra* note 167, at 363, 393–99 (discussing the extraterritorial application of U.S. environmental laws). *See generally* TRANSBOUNDARY HARM IN INTERNATIONAL LAW, *supra* note 183 (exploring the changing nature of state responses to transboundary harm).

187. *See* Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 444 (2006) (describing the citizen-suit provisions of the Great Lakes Compact and Agreement); Austen L. Parrish, *Mixed Blessings: The Great Lakes Compact and Agreement, the IJC, and International Dispute Resolution*, 2006 MICH. ST. L. REV. 1299, 1301–02 (explaining how an agreement between eight U.S. states and two Canadian provinces move Great Lakes management to the subnational level, in part by permitting citizen suits).

188. *See* DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1438–59 (2d ed. 2002) (describing the extraterritorial application of U.S. environmental statutes). *See generally* Martha E. Candiello, *The Extraterritorial Reach of Environmental Laws*, 70 TEMP. L. REV. 1235 (1997); Francioni, *supra* note 167, at 122–46; Anna D. Stasch, Arc Ecology v. United States Dep't of the Air Force*: Extending the Extraterritorial Reach of Domestic Environmental Law*, 36 ENVTL. L. 1065 (2006); Paul E. Hagen, *The Extraterritorial Reach of U.S. Environmental Law*, ALI-ABA Course of Study (2005), *available at* WL SK046 ALI-ABA 151.

189. Michael J. Robinson-Dorn, *The Trail Smelter: Is What's Past Prologue? EPA Blazes a New Trail for CERCLA*, 14 N.Y.U. ENVTL. L.J. 233, 315–19

lence of these kinds of cases, scholars have declared the "dawn of a new era" of extraterritorial transboundary environmental litigation.[190]

2. Developing Global Extraterritoriality

The new era of extraterritorial litigation is not limited, however, to American lawsuits. Transnational litigation, although predominantly occurring in the United States,[191] is spreading worldwide.[192] While the United States remains the most active promulgator of extraterritorial measures in the competition/antitrust law field, other states and regional organizations such as the European Union,[193] France,[194] Germany,[195]

(2006) (arguing that domestic lawsuits can create a race to the top in environmental regulation, and encouraging the extraterritorial application of domestic environmental laws); *see also* Joel A. Gallob, *Birth of the North American Transboundary Environmental Plaintiff: Transboundary Pollution and the 1979 Draft Treaty for Equal Access Remedy*, 15 HARV. ENVTL. L. REV. 85, 86–87 (1991) (arguing for court-based solutions to transboundary pollution problems); *cf.* Noah D. Hall, *Bilateral Breakdown: U.S.-Canada Pollution Disputes*, NAT. RESOURCES & ENV'T, Summer 2006, at 18, 23 ("Ideally, we could allow domestic litigation to resolve these disputes in a way that strengthens, not undermines, the United States-Canada relationship."); Hall, *supra* note 186, at 681, 724–36 (describing how domestic litigation can be used to address transboundary pollution).

190. *See* Randall S. Abate, *Dawn of a New Era in the Extraterritorial Application of U.S. Environmental Statutes: A Proposal for an Integrated Judicial Standard Based on the Continuum of Context*, 31 COLUM. J. ENVTL. L. 87 (2006) (recognizing but criticizing the extraterritorial application of domestic environmental law); *see also* Rachel Kastenberg, Note, *Closing the Liability Gap in International Transboundary Water Pollution Regime Using Domestic Law to Hold Polluters Accountable: A Case Study of* Pakootas v. Teck Cominco Ltd., 7 OR. REV. INT'L L. 322, 323 (2005) (arguing that extraterritorial application of domestic law is a "valid global solution" to transboundary pollution). *See generally* Neil Craik, *Deliberation and Legitimacy in Transnational Environmental Governance* 16–18 (Inst. for Int'l Law & Justice, Working Paper 2006/10, 2006) (describing the different forms of domestic environmental regulation beyond the state).

191. *See* Lori Fisler Damrosch, *Enforcing International Law Through Non-Forcible Measures*, *in* RECUEIL DES COURS 9, 183–86 (Hague Acad. Of Int'l Law ed., 1997) (describing reasons for the lack of international human rights cases in countries other than the United States).

192. *See* Stephens, *supra* note 174, at 450–56 (describing extraterritorial civil and criminal litigation in England, Canada, Australia, Spain, France, and Belgium, and arguing that these sort of cases are "developing just as rapidly as the U.S. precedents"); *cf.* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 51 (Feb. 14) (Oda, J., dissenting) (noting that "the past few decades have seen a gradual widening in the scope of the jurisdiction to prescribe law" and listing circumstances where extraterritorial criminal jurisdiction has been found to exist).

193. *See* Chad Damro, *Building an International Identity: The EU and*

the Republic of Korea,[196] and most common law countries[197] have adopted laws of extraterritorial application.[198] As Gary Born describes it, "a number of European states have begun to apply selected national regulatory statutes extraterritorially, with rigor approaching that of the United States, arousing complaints from both the United States and international businesses."[199] International and cross-border regulatory cases are now routinely heard in domestic courts throughout the world.[200] In the mid-1990s, one study concluded that "more

*Extraterritorial Competition Policy*, 8 J. EUR. PUB. POL'Y 208, 208 (2001); David J. Feeney, *The European Commission's Extraterritorial Jurisdiction Over Corporate Mergers*, 19 GA. ST. U. L. REV. 425, 427 (2002); Joseph P. Griffin, *EC and U.S. Extraterritoriality: Activism and Cooperation*, 17 FORDHAM INT'L L.J. 353 (1993); Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 159 (1999); Alexander Layton & Angharad M. Parry, *Extraterritorial Jurisdiction—European Responses*, 26 HOUS. J. INT'L L. 309, 318–22 (2003).

194. *See* Note, *A Most Private Remedy: Foreign Party Suits and the U.S. Antitrust Laws*, 114 HARV. L. REV. 2122, 2144 (2001) ("[S]everal nations, including Germany, the United Kingdom, Japan, France, Switzerland, and Australia, have crafted competition laws that purport to apply extraterritorially.").

195. *See* David J. Gerber, *The Extraterritorial Application of the German Antitrust Laws*, 77 AM. J. INT'L L. 756 (1983).

196. *See* Won-Ki Kim, *The Extraterritorial Application of U.S. Antitrust Law and Its Adoption in Korea*, 7 SING. J. INT'L & COMP. L. 386 (2003).

197. *See* Chris Noonan, *The Extraterritorial Application of New Zealand Competition Law*, 22 N.Z.U. L. REV. 369 (2007) (describing extraterritoriality in New Zealand and other common law countries).

198. United Nations, 58th Session of the International Law Commission, May 1 to June 9 & July 3 to Aug. 11, 2006, *Report*, at 527, *available at* http://untreaty.un.org/ilc/reports/2006/2006report.htm.

199. BORN & RUTLEDGE, *supra* note 135, at 569; *see also* Born, *supra* note 133, at 67–68 (describing extraterritorial laws in other parts of the world, including Germany, France, Switzerland, and Japan).

200. *See* Hanno von Freyhold et al., *The Role of Courts in Legal Interaction*, *in* FOREIGN COURTS: CIVIL LITIGATION IN FOREIGN LEGAL CULTURES (Volkmar Gessner ed., 1996) (drawing conclusions from an empirical project studying the contribution of domestic civil courts to the resolution of cross-border disputes in New York, Milan, Bremen, Hamburg, and Bremerhaven); *cf.* Adelheid Puttler, *Extraterritorial Application of Criminal Law: Jurisdiction to Prosecute Drug Traffic Conducted by Aliens Abroad*, *in* EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE, *supra* note 167, at 103 (describing the extraterritorial application of criminal laws in the Netherlands and Germany); Martin Hedemann-Robinson, *Defending the Consumer's Right to a Clean Environment in the Face of Globalisation: The Case of Extraterritorial Protection Under European Community*, 23 J. CONSUMER POL'Y 25, 25–27 (2000) (analyzing potential European extraterritorial environmental protection measures). For a discussion of a potential transnational lawsuit in Canada for polluting activities occurring in the United States, see Shi-Ling Hsu & Austen Parrish, *Litigating Canada-U.S. Transboundary Harm: International Environmental Lawmaking and the Threat of Extraterritorial Reciprocity*, 48

than 100,000 (and possibly even 200,000) international disputes enter[] the civil courts of first instance in Europe every year."[201]

Nor is the growth limited to private law or regulatory matters. Transnational public law litigation (mostly dealing with human rights and criminal law) is on the rise in other countries.[202] Some human rights advocates have declared a new era of civil international human rights litigation.[203] A number of

VA. J. INT'L L. 1 (2007).

201. Freyhold et al., *supra* note 200, at 269.

202. *See* Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 149–53 (2006) (explaining how concepts of universal civil jurisdiction are beginning to emerge outside the United States); Beth Stephens, *Translating* Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 17–27 (2002) (discussing transnational human rights litigation in other countries); Halina Ward, *Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options*, 24 HASTINGS INT'L & COMP. L. REV. 451, 456–58 (2001) (listing transnational cases occurring in England, Canada, and Australia); Fiona McKay, *Universal Jurisdiction in Europe*, REDRESS, http://www.redress.org/documents/unijeur.html (last visited Dec. 1, 2008) (describing the role of national courts prosecuting international crimes). For examples, see Andrea Bianchi, *International Decisions:* Ferrini v. Federal Republic of Germany, 99 AM. J. INT'L L. 242, 242–45 (2005) (describing a recent decision in the Italian Court of Cassation in a tort case brought against Germany for deportation and forced labor during World War II); Tarik-Abdel Monem, *How Far Do the Lawless Areas of Europe Extend? Extraterritorial Application of the European Convention on Human Rights*, 14 J. TRASNAT'L L. & POL'Y 159 (2005) (discussing the extent to which human rights treaty obligations extend beyond the territorial jurisdiction of states); Sabine Pittrof, *Compensation Claims for Human Rights Breaches Committed by German Armed Forces During the Second World War: Federal Supreme Court Hands Down Decision in the* Distamo *Case*, 5 GERMAN L.J. 15 (2004) (discussing a decision by a German court in an action by Greek citizens against Germany for World War II conduct). Extraterritorial criminal cases using universal jurisdiction are also on the rise. *See* Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1059–60 (2004) ("[In] the past decade, criminal complaints or investigations have been instituted before courts in Austria, Canada, Denmark, France, Germany, the Netherlands, Senegal, Spain, Switzerland, and the United Kingdom for atrocities in Europe, Africa and South America, . . . [and] criminal complaints have been filed in Belgium . . . against current or former leaders of Chad, Cuba, Iraq, Iran, the Democratic Republic of Congo, the Ivory Coast, the Palestinian Authority, Israel, the United States, and other countries.").

203. Bianchi, *supra* note 202, at 244 (describing "normative developments" in civil human rights litigation). For a discussion of recent cases, see Jennifer Levine, Note, *Alien Tort Claims Act Litigation: Adjudicating on "Foreign Territory,"* 30 SUFFOLK TRANSNAT'L L. REV. 101, 116 (2006) (describing such cases as the "wave of the future" and citing cases in Canada, the United Kingdom, Greece, and Italy).

high-profile cases have been brought against foreign officials under universal jurisdiction.[204] And the trend is not likely to change. Commentators argue that the number of transnational cases litigated outside the United States have, or should, increase.[205] The expectation is also that with increased extraterritorial application of domestic laws, "clashes" between inconsistent rulings in different countries will become commonplace.[206]

That other countries have followed the American extraterritorial example is hardly surprising. Over time, the United States' broad application of its own law extraterritorially has created a precedent (if not a sense of righteousness) in other countries, "who would apply their laws and their versions of international law to Americans whose actions they do not like."[207] Indeed, the use of extraterritorial laws by other countries has led to some highly publicized cases. From Internet[208] and cyber-

204. *See, e.g.*, Marlise Simons, *Belgium Indicts Chad's Ex-Leader,* N.Y. TIMES, Sept. 30, 2005, at A8; *Belgium Restricts 'Genocide Law,'* BBC NEWS, Apr. 6, 2003, http://news.bbc.co.uk/2/hi/europe/2921519.stm (describing suits brought against U.S. President George H. W. Bush and Israeli Prime Minister Ariel Sharon); Jan Arno Hessbruegge, *An Attempt to Have Secretary Rumsfeld and Others Indicted for War Crimes Under German Vőlkerstrafgesetzbuch*, ASIL INSIGHT, Dec. 2004, http://www.asil.org/insight041213.cfm; Frederic L. Kirgis, *The Pinochet Arrest and Possible Extradition to Spain*, ASIL INSIGHT, Oct. 1998, http://www.asil.org/insigh27.cfm (describing how a Spanish investigating judge issued a warrant for the arrest of former Chilean head-of-state Augusto Pinochet); Richard J. Wilson, *Argentine Military Officers Face Trial in Spanish Courts*, ASIL INSIGHT, Dec. 2003, http://www.asil.org/insigh122.cfm (describing charges against Argentine military officers in Spain and also the trial of four Catholic nuns for their alleged complicity in the 1994 Rwanda genocide).

205. *See, e.g.*, Beth Stephens, *Expanding Remedies for Human Rights Abuses: Civil Litigation in Domestic Courts*, *in* 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 119, 138 (Kelly D. Askin & Dorean M. Koenig eds., 2000) (encouraging the spread of transnational human rights litigation beyond the United States); Aceves, *supra* note 11, at 134 ("[A] universal system of transnational law litigation would be highly effective in protecting human rights."); Jordan J. Paust, Remarks at the 91st Annual Meeting of the American Society of International Law (April 11, 1997), *in* 91 AM. SOC'Y INT'L L. 259, 259 ("National prosecutions of international crime have been more frequent and are increasing in number.").

206. *See* Milena Sterio, *Clash of the Titans: Collisions of Economic Regulations and the Need to Harmonize Prescriptive Jurisdiction Rules*, 13 U.C. DAVIS J. INT'L L. & POL'Y 95, 113–17 (2007) (calling for the harmonization of jurisdiction rules to prevent clashes over the extraterritorial application of domestic laws).

207. Rubin, *supra* note 23, at 374.

208. Horatia Muir Watt, Yahoo! *Cyber-Collision of Cultures: Who Regulates?*, 24 MICH. J. INT'L L. 673, 675–77 (2003) (describing recent cases where

cases,[209] to criminal prosecutions,[210] to prominent human rights cases,[211] other countries have started to use their laws as a way to advance their own foreign policies and to respond to the perceived U.S. aspiration of special legal status. As the United States has stepped up its claims to extraterritorial jurisdiction, other countries claim "me too." In many ways then, the use of domestic laws to address transnational challenges is itself becoming an international norm.

## III. THE EXTRATERRITORIALITY THREAT

The increasing propensity of states to apply domestic laws extraterritorially should trouble international law scholars (whether Sovereigntist or Internationalist in orientation) more than it has. When taking the aims and concerns of the Sovereigntists and the modern Internationalists seriously, both groups would be better off if they encouraged curtailing the use of extraterritorial laws, while reinvigorating traditional international lawmaking. The threat of extraterritoriality is a foe to both groups, and containing it by reclaiming international law is a common objective that could bridge the theoretical divide between them.

Europe and Australia attempted to aggressively regulate content on the internet and questioning whether this constitutes "extraterritorial meddling with [U.S.] democratic values").

209. *See, e.g.*, Dow Jones & Co. v. Gutnick, (2002) 194 A.L.R. 433, 440–47 (Austl.) (applying Australian libel laws to activity in the United States); Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Nov. 20, 2000, (Fr.), *available at* http://juriscom.net/txt/jurisfr/cti/tgiparis 20001120.pdf, *translation available at* http://www.cdt.org/speech/international/20001120yahoofrance.pdf (finding that French laws apply to a U.S. internet site selling Nazi and Third Reich paraphernalia); *see also* Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 433 F.3d 1199, 1224 (9th Cir. 2006) (dismissing injunction that barred French order from applying in the U.S.).

210. *See, e.g.*, *Franks to Face Iraq Warcrimes Case*, CNN, Apr. 30, 2003, http://www.cnn.com/2003/WORLD/europe/04/29/belgium.crime/index.html?iref=newssearch (describing a Belgium case that sought to prosecute U.S. General Tommy Franks); *Abu Ghraib Torture Complaint Names Rumsfeld,* ABC NEWS, Dec. 1, 2004, http://www.abc.net.au/news/newsitems/200412/s1255125.htm (describing a criminal complaint filed in German Court against former U.S. Defense Secretary Donald Rumsfeld); *see also* Rowan Scarborough, *Germany Dismisses War-Crimes Case Against Rumsfeld*, WASH. TIMES, Feb. 11, 2005, at A10 (noting that the Rumsfeld case was eventually dismissed).

211. One example is Iran's reported enactment of legislation permitting lawsuits against the United States. *See Tehran to Set Up Special Court for Lawsuits Against the U.S.*, AGENCE FRANCE–PRESSE (Paris), Nov. 15, 2000; *Iran MPs Cry "Down with America," Approve Lawsuits Against United States*, AGENCE FRANCE-PRESSE (Paris), Nov. 1, 2000.

### A. TAKING SOVEREIGNTIST CONCERNS SERIOUSLY

Sovereigntists should find extraterritorial domestic regulation more disconcerting than classic international lawmaking through multilateral treaties. Global extraterritoriality calls into question the Sovereigntist assumption that the United States, by virtue of sheer power alone, is able to shape the world order and protect American interests. As an initial matter, retaliation is likely in the extraterritoriality context; as Richard Falk warned over forty years ago, the use of domestic law in transnational litigation invites retaliation.[212] To the extent that the United States is seen as aggressively using domestic law to assert its hegemony globally, we can expect that others will do so too.[213] The impact is real: retaliation interferes with U.S. regulatory objectives, and also "destroy[s] a spirit of cooperation and common purpose in solving international economic problems."[214] U.S. foreign relations are similarly burdened.[215] Extraterritoriality also potentially allows law to be used for purely sensational rather than legal ends; in the world of extraterritorial application of domestic law, states might manipulate domestic suits for their own political agendas.[216] In contrast,

212. RICHARD A. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER (1964).

213. *See* Bradley, *supra* note 20, at 461 (explaining how in the human rights context "other nations may retaliate by allowing suits against US government actors"); Grundman, *supra* note 152, at 258 (explaining how because of retaliation, U.S. multinational corporations are left in a vulnerable position) Stephan, *supra* note 131, at 655 ("The problem lies in the unwillingness of foreign states, including their judiciary, to go along with our project and their ability to sabotage it."); *see also* Parrish, *supra* note 132, at 49–50 (describing retaliation "when a U.S. court provides a forum for a foreign plaintiff injured in his or her home nation"); Parrish, *supra* note 167, at 409–11 (discussing reciprocity and retaliation in the context of extraterritorial environmental laws).

214. Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 SUP. CT. REV. 289, 324; *see also* Thabo Mbeki, President of South Africa, Statement to the National Houses of Parliament and the Nation at the Tabling of the Report of the Truth and Reconciliation Commission (Apr. 15, 2003), http://www.anc.org.za/ancdocs/history/mbeki/2003/tm0415.html ("[W]e consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country.").

215. *See* Bradley, *supra* note 20, at 460–64 (describing the costs to U.S. foreign relations that human rights litigation imposes); David J. Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 YALE J. INT'L L. 185, 187 (1984) (describing the negative impacts of extraterritorial laws); Slaughter & Bosco, *supra* note 75, at 106 (describing how domestic human rights litigation can impact foreign affairs).

216. Colangelo, *supra* note 138, at 134.

retaliation does not occur with multilateral treaties because treaties are a product of negotiation and consent.[217]

Retaliation also has the potential to impact American interests to a much greater extent now than it has previously. Traditionally, American companies or individuals could safely ignore foreign legal actions (i.e., default) and then litigate any attempt to enforce the foreign judgment in the United States. In cases where the foreign court's exercise of jurisdiction was viewed as exorbitant, the defendant would be largely judgment-proof.[218] Yet that strategy is no longer practical. In the wake of globalization, many American corporate defendants have significant assets throughout the world (e.g., in the EU and China), and corporations increasingly need to avail themselves of business opportunities worldwide to remain competitive in a global market.[219] More significantly, as U.S. law has recognized broader legitimate exercises of jurisdiction (such as under the effects and universality principles), so too can others nations' courts broadly exercise extraterritorial jurisdiction without it being found offensive. Of course, all this may be beside the point. Even if a judgment is ultimately unenforceable, the costs of litigation and the potential for enforcement (as slim as it may be)[220] force companies and individuals to account for foreign regulations and laws.[221] The potential impact is even

217. *See* Vienna Convention on the Law of Treaties, art. 34, May 23, 1969, 1155 U.N.T.S. 331, 341 (noting that treaties only create obligations and rights through consent); *see also* Bradley & Goldsmith, *supra* note 39, at 436–37 (explaining how states are only bound to treaty obligations after providing consent and how this is "[o]ne of the most established principles in international law"); *cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW pt. 1, ch.1, introductory note (1987) ("Modern international law is rooted in acceptance by states which constitute the system.").

218. *See* ROBERT E. LUTZ, A LAWYERS HANDBOOK FOR ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND ABROAD 22–23 (2007).

219. *See* Gerber, *supra* note 130, at 299 (noting how in global markets "[p]eople are hired and fired, factories are built, loans are taken, and supplies are purchased in many countries in order to implement competitive strategies on one market").

220. For interesting discussions of the enforcement of un-American judgments, see Mark D. Rosen, *Exporting the Constitution,* 53 EMORY L.J. 171, 172, 232 (2004) (depicting judgments as un-American if they come from "non-American polities and reflect political values that are at variance with American constitutional law," and discussing the enforcement of un-American foreign judgments from a constitutional perspective); Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 787 (2004) ("[U]n-American judgments should be enforced at least some of the time.").

221. *See* Brief for Chamber of Commerce of the United States of America as

greater in the public law context. The way the United States has waged its war on terror—viewed almost universally as extralegal[222]—means that American officials are more than ever susceptible to foreign actions.[223]

The possibility of retaliation, however, is not the only problem. Extraterritorial application of domestic law threatens democratic sovereignty[224] in a more profound way than international treaties and their institutions.[225] Under traditional notions of democracy, government rests upon the consent of the governed.[226] But extraterritorial laws force foreigners to bear

Amicus Curiae Supporting Defendant-Appellant, Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066 (9th Cir. 2005) (No. 05-35153); Brief for the Nat'l Mining Ass'n and the Nat'l Ass'n of Mfrs. as Amici Curiae Supporting Appellant, Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066 (9th Cir. 2005) (No. 05-35153).

222. From Guantanamo Bay, to prisoner abuse at Abu Ghraib, to extraordinary renditions, to alleged secret prisons, to the Iraq war, among others, the world community has condemned recent U.S. actions as illegal under international law. *See* DEBORAH PEARLSTEIN, HUMAN RIGHTS FIRST, GETTING TO GROUND TRUTH 1–20 (2004), http://www.humanrightsfirst.org/us_law/PDF/detainees/Getting_to_Ground_Truth_090804.pdf. For a description of U.S. lawsuits filed by foreign nationals against U.S. officials for their participation in the U.S. war on terror, see, for example, Julian G. Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT'L L. REV. 105 (2005).

223. *See* sources cited *supra* note 210 (reporting lawsuits against former Defense Secretary Donald Rumsfeld, U.S. General Tommy Franks and others for alleged war crimes).

224. *See* Mark P. Gibney, *The Extraterritorial Application of U.S. Laws: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. INT'L & COMP. L. REV. 297, 312–13 (1996) (describing the undemocratic nature of extraterritorial laws); Gibney & Emerick, *supra* note 164, at 133 (stating that the extraterritorial application of the law is undemocratic in that it "represents a vastly different conception of the law than what we have in the domestic realm").

225. *See* sources cited *supra* note 217 (explaining how treaties derive their legitimacy from state consent). Some scholars suggest that multilateral institutions are more likely to enhance domestic democracy than undermine it. *See, e.g.*, Robert O. Keohane et al., *Democracy-Enhancing Multilateralism* 1 (N.Y.U. Sch. Law Inst. for Int'l Law & Justice, Working Paper 2007/4, 2007), *available at* http://www.princeton.edu/~amoravcs/library/multilateralism.pdf ("[P]articipation in multilateral institutions . . . can enhance the quality of domestic democracy.").

226. THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just powers from the consent of the governed . . . ."); THE FEDERALIST NO. 39, at 254 (James Madison) (Jacob E. Cooke ed., 1961) (noting that the Constitution's authority derives from popular consent); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 362 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (suggesting that government authority to tax can only legitimately derive from the consent of the governed).

the costs of domestic regulation, even though foreigners (i.e., those beyond the state's territorial borders) are nearly powerless to change those regulations.[227] Foreigners are the true outsiders to the political process with no vote, and presumably little formal ability to influence domestic political processes.[228] The decision makers—the domestic courts—are politically unaccountable to the foreign defendants and apply laws to which the foreigners have not consented.[229] The threat to democratic sovereignty may be particularly felt when the countries in which laws are applied extraterritorially are themselves not liberal democracies. For these reasons, scholars have described the extraterritorial application of law as the greatest affront to democratic sovereignty.[230]

Admittedly, the democratic legitimacy problem has historically been less of a concern for Americans. When only U.S. law is applied extraterritorially, only foreigners suffer the affront. But as described above, no longer is extraterritoriality a uniquely U.S. phenomenon—other nations increasingly apply their law extraterritorially as well.[231] A comparison drives the point home. The practice of U.S. courts citing and using foreign law has led to fierce and virulent responses over concerns that the use of foreign law leads to undemocratic results.[232] Sovereign-

227. *See, e.g.*, Parrish, *supra* note 167, at 407 (discussing the undemocratic nature of extraterritorial laws in the Canadian-U.S. context).

228. William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 153 (1998) (noting that "[f]oreign interests are virtually unrepresented in national legislative decisions" because "[t]hey can neither vote in elections nor contribute to political campaigns"); *cf.* Jeffrey K. Powell, Comment, *Prohibitions on Campaign Contributions from Foreign Sources: Questioning Their Justification in a Global Interdependent Economy*, 17 U. PA. J. INT'L ECON. L. 957, 960 (1996) (arguing against "blanket prohibitions against all types of foreign campaign contribution").

229. Bradley & Goldsmith, *supra* note 20, at 346 ("Even assuming that the defendant-alien's country has consented to this law on the international plane, there is no evidence that this consent extends to domestic enforcement in the United States or any other country.").

230. *See, e.g.*, T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989, 1992–96 (2004) (acknowledging but criticizing the argument that "[t]o the extent that a state is subject to law made elsewhere, it has lost its sovereignty, and, perhaps, in some deep way, its right to call itself a 'state'"); *cf.* Bradley, *supra* note 20, at 464–69 (arguing that human rights litigation and its reliance on customary international law imposes costs on U.S. democracy).

231. *See supra* Part II.B.2.

232. *See, e.g.*, Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 58 (2004) (arguing that "[u]sing global

tists have written literally dozens of articles condemning the practice,[233] and the political uproar has been shrill.[234] But that affront to democratic sovereignty is minimal compared to the problems that extraterritorial laws pose—where foreign law is being directly applied to U.S. citizens and residents. That scholars have failed to condemn the practice is thus remarkable.

For Sovereigntists, a more important point remains. Given the threat of extraterritoriality, strengthening international law and institutions now may be the best means to maintain sovereignty and American hegemony and power in the long term.[235] Unlike domestic extraterritorial actions and other ad hoc relations, multilateral treaty regimes "are less vulnerable

opinions as a means of constitutional interpretation dramatically undermines sovereignty"); Laurence E. Rothenberg, *International Law, U.S. Sovereignty, and the Death Penalty*, 35 GEO. J. INT'L L. 547, 548 (2004) (arguing that the U.S. criminal justice system's sovereignty is threatened by the "insinuation" of foreign law into death penalty decisions); *see also Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H.R. 568 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 49 (2004) (statement of Jeremy Rabkin, Professor of Government, Cornell University) (arguing that the European Union "is really set on . . . undermining American sovereignty" by "infiltrat[ing] into our judicial system this idea that our judges need to listen to what their judges say").

233. *See* Parrish, *supra* note 73, at 639 n.9 (listing articles arguing against using international law in constitutional interpretation and adjudication).

234. *See* Carl Hulse & David D. Kirkpatrick, *DeLay Says Federal Judiciary Has 'Run Amok,' Adding Congress is Partly to Blame*, N.Y. TIMES, Apr. 8, 2005, at A21 (noting how Senator Tom Coburn's chief of staff, Michael Schwartz, has called for "mass impeachment" of federal judges); Adam Liptak & Robin Toner, *Roberts Parries Queries on* Roe *and End of Life*, N.Y. TIMES, Sept. 15, 2005, at A1 (describing Chief Justice John G. Roberts Jr.'s response to Senator Tom Coburn's suggestion that "Supreme Court Justices who cite to foreign judicial precedents . . . should be subject to impeachment"). Representative Tom Feeney (R-Fla.) also proposed a bill, known as the Feeney Amendment, that would "expose judges to impeachment for referring to foreign law in their opinions." *Foreign Law Bill Irks Ginsburg*, CONN. L. TRIB., Oct. 3, 2005, at 11 (discussing Justice Ruth Bader Ginsburg's remarks regarding proposed impeachment bill). The Justices have even received death threats for considering foreign authority in their decisions. *Ginsburg, O'Connor Targets of Death Threat*, NAT'L L.J., Mar. 20, 2006, at 3, 3; Tony Mauro, *Ginsburg Discloses Threats on Her Life: In Speeches, Justice Says She and Sandra Day O'Connor Were Targeted Because of Use of Foreign Law in Cases*, LEGAL TIMES, Mar. 20, 2006, at 8, 8.

235. *See* Krisch, *supra* note 107, at 375 ("U.S. activism in multilateral institution-building after World War II has arguably been due, in part, to a sense that U.S. predominance was ephemeral and would give way to a bipolar system."); *cf.* RICHARD A. MELANSON, AMERICAN FOREIGN POLICY SINCE THE VIETNAM WAR 101–02 (M.E. Sharpe 1996) (1991) (mentioning the Carter administration's "inclination to view human rights as a means to . . . sustain U.S. international influence at a time of relatively declining American power").

to later shifts in power" and are "relatively stable even if the hegemon declines."[236] International treaty law thus shapes the behavior of states.[237] And not being part of a treaty regime undermines a nation's ability to influence the development of the law.[238] If the insight from realists and modern rationalist scholars is that international law is all about power, then the United States would be wise to use that power to influence international law while it still can.[239] With indications that China and the EU may begin to challenge U.S. hegemony, embracing international law now—while the United States is still in a position to shape norms—may be strategically wise.[240] That is, "[f]or those interested in promoting democratic sovereignty, it is a far, far better thing for the United States to be the chief progenitor of international law than, say, the People's Republic of China."[241]

In contrast, American influence over the world is much more circumscribed when domestic law replaces international law. Conducting foreign policy through courts is difficult—this

236. Krisch, *supra* note 107, at 373.

237. Hathaway, *supra* note 25, at 473 (arguing and demonstrating how "international treaty law profoundly shapes state behavior"); *see* Pierre Klein, *The Effects of US Predominance on the Elaboration of Treaty Regimes and on the Evolution of the Law of Treaties*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 363, 363–64 (Michael Byers & Georg Nolte eds., 2003) (explaining how the "influence exerted by a particularly powerful State on the treaty-making process may therefore have an important impact on the shaping of international law in the years and decades to come").

238. The Clinton Administration's approach to the Rome Statute, and its decision to sign the treaty despite strong U.S. opposition to the International Criminal Court illustrates the point. *See* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 95 AM. J. INT'L L. 387, 399 (2001) ("With signature . . . [the United States] will be in a position to influence the evolution of the court." (quoting Statement on the Rome Treaty on the International Criminal Court, 37 WEEKLY COMP. PRES. DOC. 4 (Dec. 31, 2000))); *see also* Klein, *supra* note 236, at 363–91 (describing U.S. influence on treaty regimes).

239. *See* Klein, *supra* note 237, at 363 ("History shows that it is very generally much more efficient in the long run for States to 'apply power within the framework of an institution or legal system' rather than to resort to raw military force or economic coercion." (quoting MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES 6 (1999))).

240. Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843, 843 (2001) (explaining that "America is in a position to reshape norms, alter expectations and create new realities" through "unapologetic and implacable demonstrations of will"); *see* Klein, *supra* note 237, at 365–71 (explaining how the U.S. can exert influence on the formation of international law through treaty-making).

241. Drezner, *supra* note 4, at 333.

would be true even if extraterritorial lawsuits were limited to U.S. courts. In the United States, exploitative litigation can be filed "because of weak constraints on the kinds of suits that get filed and the potential for perverse incentives to litigants."[242] But these concerns are magnified when dealing with foreign legal systems. Is the U.S. government to keep track of all lawsuits filed abroad that can potentially affect American interests? Even then, national governments have less opportunity and ability to interact and directly influence other countries' courts. And to the extent that influence exists, national governments find it much easier to deal with foreign affairs issues at government-to-government levels. At minimum, Sovereigntists should be concerned with domestic courts wielding greater influence in developing international law. Whether private litigation—even in a U.S. court—is the best way to resolve complicated transboundary issues is far from clear.[243] At the very least, foreign courts will be open to the accusation of parochial biases—with the appearance, if not the reality, that those courts favor foreign over U.S. interests.[244]

242. Stephan, *supra* note 131, at 660.

243. Hall, *supra* note 186, at 449 (noting that the U.S. Supreme Court has "admitted that it is not the ideal forum for addressing transboundary pollution disputes, which tend to involve complex technical and scientific issues with major political and economic ratifications"); *see also* Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 829–31 (1989) (noting the problems with domestic courts deciding issues involving foreign affairs); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1668 (1997) (arguing that courts are poorly equipped to address questions involving foreign relations); John Yoo, *Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act*, 20 HASTINGS INT'L & COMP. L. REV. 747, 764 (1997) ("Courts are imperfect tools for gathering information, especially when the relevant issues for decision involve broader political, economic, and social events and trends.").

244. In a related vein, much has been written concerning parochial bias in U.S. courts. *See, e.g.*, Born, *supra* note 133, at 95–99 (arguing that parochial bias is not a problem in U.S. courts); Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1120–22, 1143 (1996) (exploring reasons why foreigners fear U.S. courts but concluding, based on empirical data, that foreign litigants "do very well" in U.S. courts); Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1, 35–36 (1996) (describing bias against foreign citizens in U.S. courts). Christopher A. Whytock, *Myth or Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. (forthcoming 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1257096 (arguing, based on empirical data, that transnational choice-of-law decisions in U.S. courts are not biased in favor of domestic law, domestic litigants, or plaintiffs).

A natural response exists to all this. Some international law skeptics presumably would prefer a world where domestic extraterritorial laws are curtailed, and international law is also rejected. In such a world, states would rely solely on politics and power to extend influence. Yet such an approach would be near impossible to implement. In a globalized, modern, interdependent world, "it is impossible to conceive of a return to nature, to a pre-regulatory planet in which each state is free to act as it wishes, unfettered by international obligations."[245] Even if the forces of globalization were not an issue, NGOs, activist groups, and other states would not sit by idly. A remedy must exist somewhere for international harms. And if an entity has engaged in a blatant violation of an international norm, why should the entity not be held accountable? The question then is not whether law will address international challenges, but rather whether it will be international or extraterritorial in nature.

### B. TAKING MODERN INTERNATIONALIST CONCERNS SERIOUSLY

The modern Internationalists should also be wary of courts extraterritorially applying domestic laws as a way to address international challenges. As a means of promoting human and environmental rights, the extraterritorial application of domestic law is likely to be successful, if at all, only in the short term. From a Sovereigntist perspective, one of the threats of non-U.S. transnational litigation is the inability of the U.S. federal government to easily respond. From a modern Internationalist perspective, the problem is that foreign governments may be all too good at responding. Indeed, foreign states have long resisted U.S. civil litigation as a way of projecting American policy.[246] From diplomatic protests[247] to nonrecognition of judgments,[248] to enactment of blocking[249] or clawback statutes,[250]

245. SANDS, *supra* note 97, at xviii.

246. Stephan, *supra* note 131, at 655.

247. For example, the European Community and the United Kingdom submitted protests when the United States amended its Export Administration Regulations to prohibit the export of oil or natural gas exploitation equipment to the Soviet Union. A. V. LOWE, EXTRATERRITORIAL JURISDICTION: AN ANNOTATED COLLECTION OF LEGAL MATERIALS 197, 201 (1983) ("The United States measures as they apply in the present case are unacceptable under international law because of their extra-territorial aspects. They seek to regulate companies not of United States nationality in respect of their conduct outside the United States and particularly the handling of property and technical data of these companies not within the United States.").

248. *See generally* LUTZ, *supra* note 218 (criticizing the United States for

countries have a wide range of options to prevent the effective extraterritorial application of U.S. laws. And, even worse, some commentators believe the effect could spur a backlash and goad foreign governments away from those values we hold most important.[251]

Yet ineffectiveness of enforcement is not the only problem that should concern modern Internationalists. Extraterritorial laws undermine international law in a more fundamental way. Persistent resort to domestic courts, rather than developing multilateral treaty regimes, creates a self-perpetuating cycle

not recognizing international civil judgments and prescribing a method for litigating the enforcement of foreign judgments at home and abroad). For a discussion of extraterritoriality and its connection to judgment enforcement, see Berman, *supra* note 155, at 945 ("[I]t is clear that judgment recognition is increasingly the place where deterritorialized jurisdictional assertions meet the reality of territorial enforcement.").

249. *See* Harry L. Clark, *Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures,* 20 U. PA. J. INT'L ECON. L. 61, 81–87 (1991) (describing blocking statutes in the E.U., Canada, and Mexico); William S. Dodge, *Antitrust and the Draft Hague Judgments Convention*, 32 LAW & POL'Y INT'L BUS. 363, 363 n.1 (2001) (noting that the Netherlands, the United Kingdom, Germany, France, Norway, Belgium, Sweden, Australia, Canada, and South Africa have all enacted blocking legislation to U.S. antitrust laws); *cf.* John W. Boscariol, *An Anatomy of a Cuban Pyjama Crisis: Reconsidering Blocking Legislation in Response to Extraterritorial Trade Measures in the United States*, 30 LAW & POL'Y INT'L BUS. 439, 441–42 (1999) (describing the Canadian law that, inter alia, subjects individuals and corporations to criminal investigation or prosecution for complying with extraterritorial measures); Note, *Insider Trading and the Internationalization of the Securities Markets,* 27 COLUM. J. TRANSNAT'L L. 409, 423 (1989) (explaining that French blocking laws "forbid[] nationals, and certain others with ties to France, from divulging economic, commercial, industrial, financial or technical matters to foreign authorities except as provided by international agreement").

250. A clawback statute "enables certain defendants who have paid a multiple damage judgment in an overseas country to recover the multiple portion of that judgment from the successful plaintiff." Note, *Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law*, 81 COLUM. L. REV. 1097, 1097–98 (1981); *see* Foreign Extraterritorial Measures Act, R.S.C., ch. F-29 (1985) (examples of blocking and clawback statutes in the Canadian context); *see also* Andrew C. Dekany, *Canada's Foreign Extraterritorial Measures Act: Using Canadian Criminal Sanctions to Block U.S. Anti-Cuban Legislation*, 28 CAN. BUS. L.J. 210, 211 (1997); William C. Graham, *The Foreign Extraterritorial Measures Act*, 11 CAN. BUS. L.J. 410, 410–12 (1986); *cf.* Mitsuo Matsushita & Aya Lino, *The Blocking Legislation as a Countermeasure to the U.S. Anti-Dumping Act of 1916: A Comparative Analysis of the EC and Japanese Damage Recovery Legislation*, 40 J. WORLD TRADE 753 (2006).

251. *See* Stephan, *supra* note 131, at 658 ("The more general point is that U.S. lawsuits motivated by expressive concerns run the risk of goading foreign governments away from moderation and reconciliation and toward intransigence.").

that ultimately undermines progressive development of international treaty law and international institutions.[252] A singular focus on developing and enforcing norms in domestic courts detracts from attention and efforts to develop international laws and shared norms.[253] At least comprehensive solutions are nearly impossible through domestic litigation. Extraterritoriality inevitably leads to a patchwork of inconsistent adjudications as different courts from different countries approach international issues using different laws and procedures.[254] In comparison, international tribunals enjoy procedural and other advantages that make them more suited to resolving international claims.[255]

Modern Internationalists should also be wary (or perhaps embarrassed) of the apparent imperialism of using U.S. laws to serve global goals. Scholars have already challenged substantive human rights law as imposing Western values on other cultures.[256] The extraterritorial application of American law

252. *S*ee Peter G. Danchin, *U.S. Unilateralism and International Protection of Religious Freedom: The Multilateral Alternative*, 41 COLUM. J. TRANSNAT'L L. 33, 73 (2002).

253. *Cf.* Dubinsky, *supra* note 140, at 303 ("To date the human rights community has offered little outward reflection on whether an aggressive agenda focused on domestic courts may harm the very institutions to which these advocates have turned.").

254. *See, e.g.*, Paul L. Langer, *Significant Current Developments in Environmental Insurance Coverage,* 690 PLI/Comm. 129, 129 (1994) (describing a "litigation explosion" over the insurance coverage aspects of environmental liability that has led to a "patchwork of inconsistent and often conflicting decisions"); *cf.* Abate, *supra* note 190, at 131–33 (noting that climate change litigation is a patchwork, rather than comprehensive, solution that invites retaliation and discord between bordering nations); Erik B. Bluemel, *Unraveling the Global Warming Regime Complex: Competitive Entropy in the Regulation of the Global Public Good,* 155 U. PA. L. REV. 1981, 2043–45 (2007) (promoting the efficiency of harmonization and the benefits of a single trading regime over a multiple regime complex); Jonathan Turley, *A Crisis of Faith: Tobacco and the Madisonian Democracy*, 37 HARV. J. ON LEGIS. 433, 471–78 (2000) (calling for national standardization of mass-tort litigation to prevent states from enacting laws that favor their citizen-plaintiffs over those in other states).

255. Dubinsky, *supra* note 140, at 308–09 (finding that supranational tribunals, like the five geographically specific atrocity courts created by the U.N., are procedurally advantaged over domestic courts because they were "written with genocide, war crimes, and crimes against humanity in mind," and can offer regional expertise as well as continuity).

256. *See, e.g.*, M.O. Chibundu, *Making Customary International Law Through Municipal Adjudication*, 39 VA. J. INT'L L. 1069, 1137 (1999); *see also* SASSEN, *supra* note 57, at 18 (describing the formation of transnational regimes "centered in Western economic concepts"); Buxbaum, *supra* note 140, at 302–03.

certainly has the appearance of a unilateral instrument of American hegemony.[257] Other countries often view American court decisions as suspect.[258] This is particularly true when the United States applies a double standard—permitting foreigners to be sued in U.S. courts, but not permitting human rights lawsuits to be filed against American actors.[259] Accordingly, vigorous enforcement of human rights through international instruments and institutions often has a greater claim to legitimacy than domestic enforcement.

That other nations increasingly enforce their domestic law extraterritorially to extend their own international influence is problematic in another way. Little reason exists to believe that foreign laws necessarily will be consistent with Western concepts of justice. As Alfred Rubin argued almost twenty years ago, when transnational human rights litigation was in its nascent stages, "[p]lacing ourselves in the position of world police-

257. Buxbaum, *supra* note 140, at 304 (discussing the concern that transnational litigation will be used to serve U.S. regulatory ends); *see also* Krisch, *supra* note 107, at 402–03 (2005) (tracking the maintenance of American hegemony through the use of conditions for aid and market access, human rights certification mechanisms, and unilateral sanctions); *cf.* Rubin, *supra* note 23, at 374 (noting that the perceived illegitimacy of American prescriptive, adjudicative and enforcement jurisdiction provides a common enemy—the United States—for governments who ignore their own international obligations). *See generally* Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229 (1991) (surveying the increasing influence of American legal concepts in European business and corporate law, constitutional law, and tort law).

258. *See, e.g.*, Dubinsky, *supra* note 140, at 309 n.510 (reporting on a Mississippi case in which a local plaintiff sued a Canadian corporation and won an excessive punitive judgment after a trial fraught with bias and racism).

259. *See* Pierre-Marie Dupuy, *Comments on Chapters 4 and 5*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW, *supra* note 84, at 183 ("Clearly wishing to exercise leadership of the planet, now organized on the basis of the standards of 'good governance' drawn from its experience of democracy alone, which is regarded as in principle superior to that of others, the United States claims simultaneously to subject other States to respect international law while freeing itself as far as at all possible from the constraints that same law imposes on it."); *see also* Bradley, *supra* note 20, at 469 ("The U.S. government often assesses other nations' compliance with international human rights standards, but it generally has been unwilling to apply international human rights law inward against domestic governmental actors."); *cf.* Krisch, *supra* note 107, at 391 (discussing resistance by the United States to international human rights mechanisms that criticize or run counter to its own domestic policies). *But see* Jack Goldsmith, *International Human Rights Law and the United States Double Standard*, 1 GREEN BAG 2d 365, 366 (1998) (exploring, and ultimately defending, the double standard of the United States' refusal to "embrace the international human rights standards that it urges on other[]" nations).

man for our version of international law creates a defensive reaction in even our allies . . . . It creates a precedent and sense of righteousness in others who would apply their laws and their versions of international law to Americans whose actions they do not like."[260] In recent years, even "U.S. courts have tended to adopt very narrow interpretations of rights protected under international human rights and humanitarian law treaties."[261] Internationalists rightly fear how U.S. courts will construe environmental rights.[262] This fear should be much greater with foreign courts that are less likely to share U.S. visions of liberal, democratic values.[263] At the very least, lawsuits may be filed by opportunistic litigants.[264] Or litigants may begin to forum shop to preemptively prevent suits seeking to impose liabili-

260. Rubin, *supra* note 23, at 374.

261. Sloss, *supra* note 25, at 48; *see, e.g.*, Hamdan v. Rumsfeld, 415 F.3d 33, 40–42 (D.C. Cir. 2005) (declining to enforce Common Article 3 of the Geneva Conventions in federal court, because the war against terrorism is not an "armed conflict not of an international character"), *rev'd*, 548 U.S. 557 (2006); United States v. Duarte-Acero, 132 F. Supp. 2d 1036, 1041 (S.D. Fla. 2001) (holding that defendant was not entitled to protection under the International Covenant on Civil and Political Rights (ICCPR) because Ecuador first arrested him before turning him over to the United States Drug Enforcement Agency, so any claim of ICCPR violations would have to be brought in Ecuador); *see also* Bradley, *supra* note 20, at 466 (arguing that U.S. federal judges have used judicially created doctrines to limit, not advance, human rights litigation).

262. Far from certain is whether courts will be friendly to environmental rights. *See* Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 346 (1989) (describing recent U.S. Supreme Court decisions more pro-development than pro-environmental); *cf.* Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 703 (2000) (analyzing the votes of individual Justices of the U.S. Supreme Court in support of the argument that the Court views environmental protection "as merely an incidental factual context" for a given case, rather than recognizing environmental law as a discrete area of law). *See generally* Richard J. Lazarus, *Thirty Years of Environmental Protection Law in the Supreme Court*, 17 PACE ENVTL. L. REV. 1 (1999) (demonstrating that a significant number of U.S. Supreme Court decisions have had anti-environmental results).

263. This is particularly true with the "global rise in religious fundamentalism and an increased focus on the plight of women living under oppressive, patriarchal regimes." Angela R. Riley, *(Tribal) Sovereignty and Illiberalism,* 95 CAL. L. REV. 799, 806 (2007). After all, law is embedded in the culture and history of a nation and its peoples. *See, e.g.*, ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 42 (Isaac Kramnick ed., 2007) (1835) (explaining that social condition is the source of laws).

264. Stephan, *supra* note 131, at 651–52 (illustrating problems of exploitive and opportunistic civil litigation).

ty.[265] Internationalists might then do well to oppose in principle all kinds of transnational extraterritorial litigation on the grounds that domestic courts may set dangerous precedents weakening international legal protection.

This concern can be viewed from a slightly different perspective. In the international sphere, the United States was successful in imposing its perspective on international law after the Second World War, and the result has been the rise of human rights regimes. But if law migration really can occur,[266] would the modern Internationalists be comfortable if the international norms being created are not only non-American, but un-American, illiberal, and perhaps counter to traditional concepts of individual rights?[267] There's little reason to believe that other states (those unfriendly to human and environmental rights) will not equally be able to influence and effect change in international law.[268] Said differently, the disaggregation of the nation-state may lead to a pluralism that we are uncomfortable with.

### C. WHAT IS TO BE DONE?

So how should Sovereigntists and modern Internationalists respond to the threat of extraterritoriality? A complete description of how to reclaim international law is beyond the scope of this article. But some modest observations are appropriate.

Good reasons exist to embrace traditional international law. State-centered international law, tempered by strong human rights enforcement, is designed to prevent jealousies between states and excessive nationalism. Indeed, the widely held view of international law, until recently, was one of a system that would "triumph over narrow nationalism and, in so doing, . . . promote the peaceful settlement of disputes and a

265. Bradley, *supra* note 20, at 471 (describing the problem of forum shopping in human rights litigation, particularly via the Alien Torture Statute).

266. *See* Spiro, *Globalization*, *supra* note 1, at 728 (arguing that "a global order . . . [of] communities of transnational definition" has restructured how nation-states exercise their powers); *cf. id.* at 730 ("[N]o country—not even the supposed sole superpower—can resist or insulate itself from global forces.").

267. For an interesting discussion of the problems of tolerating illiberal groups in the context of American Indian tribal sovereignty, see generally Riley, *supra* note 263.

268. *See* Yves Dezalay & Bryant Garth, *Dollarizing State and Professional Expertise: Transnational Processes and Questions of Legitimation in State Transformation, 1960–2000*, *in* TRANSNATIONAL LEGAL PROCESSES: GLOBALISATION AND POWER DISPARITIES 199 (M. Likosky ed., 2002) (describing the importing and exporting of ideas and norms).

common, cooperative approach to the resolution of global issues."[269] And it has worked reasonably well. Under classic international law doctrine, respect for territorial integrity through nonintervention in other states' domestic affairs promoted peace and stability.[270] This is the core of the concept of sovereign equality and the ban on nonintervention.[271] But extraterritorial application of law threatens to compromise that very principle,[272] and with it the stability the world has seen over the past fifty years.

The United States should encourage the development of international norms and procedures, because by doing so it protects its position in the world, and it avoids the difficulties with extraterritoriality. States enter into multilateral agreements specifically to obtain political, military, and economic security. Once created, multilateral laws and their institutions are less vulnerable to later shifts in power—thus protecting the interests of hegemons, like the United States, and projecting their influence even after hegemony has ended.[273] Nico Krisch has described it well, explaining how international law can lead to stability and the embedding of the values of dominant states:

> [I]nternational law is also extremely useful as an instrument of stabilization: it allows dominant states to project their visions of world order into the future, since once they are transformed into law, the backward-looking character of international law makes them reference points for future policies. And oftentimes, concepts strongly rooted in international legal norms create a new normality: over time, they modify the conceptions of legitimacy of international society, which makes later changes all the more difficult.[274]

269. Franck, *supra* note 83, at 89.

270. U.N. Charter art. 2, para. 7.

271. Dupuy, *supra* note 259, at 180.

272. *See id.* at 181 (explaining that extraterritorial application of law is "incompatible with the principle of sovereign equality, since sovereignty is characterized specifically by the exclusivity of a sovereign State's normative powers in its own territory").

273. Krisch, *supra* note 107, at 373 ("[M]ultilateral norms and institutions are less vulnerable to later shifts in power than ad hoc political relations; they will thus be relatively stable even if the hegemon declines, and will for some time preserve an order that reflects the hegemon's preferences (stabilization)."); *cf.* Rachel Brewster, *The Domestic Origins of International Agreements,* 44 VA. J. INT'L L. 501, 511–22 (2004) (arguing that international agreements are a more stable method of entrenching domestic policy than statutory law). *See generally* G. JOHN IKENBERRY, AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS (2001) (describing how international governance can serve the interests of hegemonic powers).

274. Krisch, *supra* note 107, at 377.

Some evidence also exists that, unlike extraterritorial laws, international lawmaking is democracy-enhancing,[275] and particularly useful to aid other states transition to democratic government.[276]

A common response is to agree with these benefits, but to suggest that extraterritorial national laws are a necessary impetus to obtain international agreement.[277] The idea is enticing and appears logical: conflict between states will spur negotiations and provide incentives to cooperate multilaterally.[278] But ultimately, the idea flounders and does not lead to the cooperation expected. First, little empirical support exists to suggest that extraterritorial laws lead to greater cooperation.[279] The United States, for example, began applying its antitrust laws extraterritorially in the 1940s.[280] Yet not until 1999 did the United States enter its first bilateral antitrust agreement.[281] And despite fierce foreign opposition to extraterritorial U.S. antitrust laws and the ensuing friction—which, in theory, should have spurred international lawmaking—cooperation in the form of a multilateral competition treaty seems still far out of reach.[282] Second, historically it has been the United States—

275. Robert O. Keohane et al., *Democracy-Enhancing Multilateralism* 1 (Inst. Int'l Law & Justice Working Paper No. 2007/4, 2007), *available at* http://www.iilj.org/publications/documents/2007-4.GAL.KMM.web.pdf ("[M]ultilateralism often enhances domestic democracy in the contemporary world. It can restrict the efficacy of special interest factions, protect individual rights, and improve the quality of democratic deliberation.").

276. Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law,* 38 N.Y.U. J. INT'L L. & POL. 707, 712 (2006) ("International law . . . is a particularly useful device for certain kinds of states, namely those that are undergoing a transition to democracy.").

277. *See* Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799, 1817 (1992) (arguing for a presumption that U.S. laws apply in antitrust and securities litigation "whenever there are effects in the United States that are . . . direct, substantial, and reasonably foreseeable" internal citation omitted)).

278. Dodge, *supra* note 228, at 166–67 (suggesting that extraterritorial laws can spur greater cooperation by providing stronger incentives to negotiate).

279. Conventional wisdom has always suggested the opposite is true. *See supra* notes 212–15 and accompanying text (describing the conflicts, tensions, and problems created unnecessarily by extraterritorial laws).

280. Eleanor Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911, 912–13 (2003).

281. *Id.* at 921 n.27.

282. *See* Andrew T. Guzman, *Is International Antitrust Possible*?, 73 N.Y.U. L. REV. 1501, 1504 (1998) ("[T]he incentives facing individual countries make it extremely difficult—perhaps impossible—to negotiate substantive in-

not other countries—that has needed encouragement to enter into multilateral treaties, even those that serve long term American interests.[283] Extraterritorial American laws have not only taken the pressure off the United States to join multilateral agreements, but have provided it an incentive to derail them.[284] More importantly, those who argue for extraterritorial laws as a means of advancing international cooperation again assume that the extraterritorial laws will be only American laws (i.e. that the pressure will only be placed on other countries). But in an age of global extraterritoriality, it is far from clear why the United States should welcome pressure, through extraterritorial laws, compelling it to negotiate international agreements from a position of weakness rather than power.[285] Using extraterritorial laws then as a way to achieve international agreement seems a particularly misguided strategy.

To be sure, there may be short-term costs of turning to international treaties and multilateral agreements as a way to solve transboundary challenges. In reclaiming international law—embracing multilateralism—the United States would

ternational antitrust agreements."). *See generally* Anu Bradford, *International Antitrust Negotiations and the False Hope of the W.T.O.,* 48 HARV. J. INT'L L. 383 (2007) (exploring why binding international agreement on antitrust issues has been difficult to reach); Riyaz Dattu, *A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment*, 24 FORDHAM INT'L L.J. 275 (2000) (examining the failure of the Havana Charter and multilateral agreements on investment, despite fifty years of attempts). Efforts to create a multilateral treaty on recognition and enforcement of judgments have also collapsed. *See* Foreign Judgments Recognition and Enforcement Act (Tentative Draft No. 2, 2004), *available at* http://www.ali.org; *see also* Council to the Members of the American Law Institute, International Jurisdiction and Judgments Project (NKA Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute), 82 A.L.I. Proc. 74-312 (2004) (unpublished), *available at* http://www.ali.org.

283. *See infra* Part II.A. In the antitrust context, the U.S. has been the primary stumbling block to multilateral agreement. *See* Sharon E. Foster, *While America Slept: The Harmonization of Competition Laws Based upon the European Union Model*, 15 EMORY INT'L L. REV. 467, 498 (2001).

284. Foster, *supra* note 283, at 498.

285. Some evidence suggests European countries are using extraterritorial laws as a way to "compel the United States to come to the table and negotiate global standards for antitrust enforcement." Antonio F. Perez, *International Antitrust at the Crossroads: The End of Antitrust History or the Clash of Competition Policy Civilizations?*, 33 LAW & POL'Y INT'L BUS. 527, 527 (2002). *See generally* Sarah Stevens, *The Increased Aggression of the E.C. Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatlantic Cooperation in Antitrust*, 29 SYRACUSE J. INT'L L. & COM. 263 (2002) (describing pressure placed on the United States and American companies through extraterritorial regulation).

need to give up its claims to American exceptionalism. As a nation, we would have to be content to find that at times our international obligations would run counter to immediate American interest. But we could also be comforted by the knowledge that overall, in the longer term, our interests would be protected to a greater extent. Indeed, in the past, "as long as [the United States has] limited itself to the promotion of its own interests (which is the essence of international negotiations), the United States has experienced an appreciable success in shaping international law through treaties."[286] Only when it "pretends to be entitled to some kind of exceptional treatment" has the United States met with opposition and become isolated.[287]

Before concluding, two things that this article does not advocate are worth emphasizing. First, the United States has the right—indeed, the duty—to refuse to sign and ratify an international treaty with which it disagrees. But the refusal should come from disagreement with the details of the treaty itself, not from a generalized philosophical objection to international law solely because it is international. Nor should the objection to treaties come from a perceived moral imperative to vindicate U.S. democratic sovereignty, given the democratic problems that the extraterritorial alternative implicates. Neither should international treaties be set aside merely because they lack the expediency of domestic actions. Difficult compromises and hard work are to be expected and are beneficial to ensure good law. It is much better for the United States to take these steps now, while it remains in a position of global power, than to wait until its power ends, and the ability to negotiate beneficial, albeit self-serving, treaties is circumscribed.

Second, this article does not criticize those activists who bring extraterritorial claims. They are acting as lawyers for their clients. They have not been hired to worry over the long-term policy implications of extraterritorial lawsuits. But academics and policymakers have no such excuse. They should be much more sensitive to the long-term implications of turning toward extraterritorial domestic law. For the activists, in the current atmosphere where international law is particularly weak, litigation may make sense. Certainly, litigation may provide interim relief until more comprehensive solutions are found.[288] And private party litigation can serve the important

286. Klein, *supra* note 237, at 375.

287. *Id.* at 375–76.

288. *See, e.g.*, David R. Wooley, *Acid Rain: Canadian Litigation Options in*

function of focusing attention upon the problem. In fact, the public attention generated may be the only real benefit of these kind of transnational extraterritorial suits.[289] But in the long run, extraterritoriality is not a sustainable way to solve global challenges.

## CONCLUSION

In recent years, the United States has withdrawn from international law and multilateral institutions. Concomitant with the withdrawal has been a dramatic expansion of the use of extraterritorial laws—both in the public and private law contexts. Other countries are now following suit. The result is that domestic law, applied extraterritorially, is beginning to replace international law. In some ways, international law theorists have encouraged these changes, by either exalting the benefits of transnational litigation (as a short-term means of enforcing international norms) or by condemning everything international because of concerns over democratic legitimacy.

The result is unfortunate. Scholars have miscalculated the problems that extraterritorial laws create; extraterritorial domestic laws are a greater threat to what international theorists value most. Understanding international law as a system governed by consent-based rules (not unilateral imposition), leads to political legitimacy and meaningful enforcement. Global governance based on extraterritorial domestic laws is an unsustainable and unstable system. And international laws—respected and embraced—may be the best way to check the problems that rampant extraterritoriality creates. In the longer view, international law is better suited to address international challenges, as well as to promote respect for international human rights. International law scholars would therefore be wise to reclaim international law.

*U.S. Court and Agency Proceedings*, 17 U. TOL. L. REV. 139, 139 (1985) (describing the interim benefits of litigation in the acid-rain context, while more comprehensive solutions are being explored).

289. *Cf.* Slaughter & Bosco, *supra* note 75, at 106 (stating that the principal benefit in human rights litigation under the Alien Tort Claims Act may be the "public attention they generate").